79-190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

GENERAL ATOMIC COMPANY,
Petitioner

v.

UNITED NUCLEAR CORPORATION and INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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OPINIONS BELOW

The opinions of the New Mexico Supreme Court (Pet. App. A, pp. 1a–42a, *infra*)[1] and of the District

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[1] The opinion was issued on May 7, 1979, and was corrected by the New Mexico Supreme Court, *sua sponte*, by order of May 18, 1979. The opinion is reproduced at Pet. App. A as corrected. See also note 13, *infra*.

Court for the First Judicial District, Santa Fe County, New Mexico (Pet. App. B, pp. 43a–51a, *infra*) are not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court, affirming the "partial final judgment" of the District Court (Pet. App. C, pp. 52a–53a, *infra*), was entered on May 7, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether petitioner, having been unconstitutionally enjoined from instituting federal arbitration for almost 19 months until the trial court's illegal injunction was reversed by this Court (434 U.S. 12) and having demanded arbitration on the day after the unlawful injunction was removed, may have its right to federal arbitration frustrated by the enjoining court's decision to proceed with a trial on the ground that petitioner had "waived" federal arbitration by failing to demand arbitration while the injunction was in effect.

2. Whether the trial court's finding that petitioner had "waived" its federal arbitration rights satisfied

(a) the substantive standards for waiver prescribed by the Federal Arbitration Act, as judicially interpreted and applied, and

(b) the procedural standards prescribed by the Due Process Clause of the Fourteenth Amendment and by the Federal Arbitration Act in view of the judge's denial of GAC's request for an evidentiary hearing.

3. Whether a party which has been unconstitutionally enjoined from instituting arbitration under the Federal Arbitration Act should, upon reversal of the illegal injunction, be restored to the *status quo ante*, including the invalidation of all orders entered by the state trial judge after he unlawfully assumed exclusive jurisdiction over the dispute.

4. Whether the Federal Arbitration Act permits state courts, rather than arbitration panels, to determine if a party entitled to arbitration has delayed in demanding arbitration and thereby waived the right to arbitrate.

5. Whether a dispute over an interstate supply contract with an arbitration clause is exempt from the Federal Arbitration Act and rendered nonarbitrable because the party opposing arbitration asserts state antitrust defenses to performance of the contract, objects to the arbitration of such defenses, and contends that they are "intertwined" with concededly arbitrable issues.

STATUTES INVOLVED

Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, provides:

> § 3. ***Stay of proceedings where issue therein referable to arbitration***
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,

shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

> § 4. ***Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination***
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration

agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT

Introduction

This is another chapter in the struggle of General Atomic Company ("GAC") to have a billion-dollar dispute with United Nuclear Corporation ("UNC") resolved in arbitration under the Federal Arbitration Act, as provided in the contract of the parties, rather than in the state courts of New Mexico—the forum in which UNC initiated proceedings and to which it has tenaciously confined this dispute for the past four years. On two earlier occasions, this Court has sum-

marily reversed rulings of the Santa Fe trial judge which denied GAC access to federal forums, including federal arbitration. *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977); *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978). A nationally distinguished arbitration panel, consisting of a former Chief Justice of the Supreme Court of Illinois, a former Secretary of Labor, and a well-known professor of law,[2] was convened following this Court's second decision, and the panel has now conducted 7 days of hearings and received lengthy submissions and voluminous exhibits from the parties relating to numerous preliminary questions. UNC has made a number of unsuccessful efforts in federal courts to prevent, terminate or limit the arbitration. It has succeeded only in this case, obtaining a decision from the Supreme Court of New Mexico which again endeavors to preserve exclusive jurisdiction over this dispute in the New Mexico courts, this time on the ground that GAC has "waived" its right to arbitrate by its compliance with the preliminary injunction which this Court invalidated. UNC has argued to the arbitration panel and to federal courts that the New Mexico decision finding that arbitration was "waived"—made in the context of a request for a stay of the trial—totally forecloses the arbitration remedy on grounds of *res judicata* and is binding on the parties. Thus, unless this Court reverses the judgment below, the New Mexico courts will again have effectively "interfered with" and "impeded" GAC's efforts to have its dispute with UNC considered and decided by a federal arbitration panel.

[2] The members of the arbitration panel are Walter V. Schaefer, W. Willard Wirtz and Julian H. Levi.

The effect of the New Mexico court's interference with federal arbitration is particularly damaging in light of what occurred in the New Mexico courts while access to federal forums was being unconstitutionally denied. During the almost 26 months between April 2, 1976, when the unconstitutional injunction was first issued, and May 30, 1978, when this Court effectively vacated the trial judge's second invalid order, the Santa Fe judge issued an extraordinary discovery order directing that documents and information, held in Canada by a subsidiary of a non-party and producible only in violation of Canadian criminal law, be made available to UNC. Because the documents and information were not produced by GAC, the Santa Fe judge terminated the trial before the plaintiff's case had been concluded and entered a default judgment against GAC in favor of UNC and the third-party defendant, Indiana & Michigan Electric Co. ("I&M").

This remarkable turn of events, culminating with the entry of a billion-dollar default judgment because of a party's inability to produce documents or information located abroad, would not have occurred if GAC had been permitted to demand federal arbitration in the pretrial stages of the Santa Fe litigation or even if GAC had been permitted to pursue the demand for federal arbitration served and filed immediately upon dissolution of the unconstitutional injunction. Instead of staying his trial on GAC's timely request, the Santa Fe judge issued findings that GAC had "waived" its rights and even entered a second unlawful order "staying" the federal arbitrations. The result of this sequence of rulings regarding arbitration by the Santa Fe judge—none of which was disturbed by the New Mexico Supreme Court—is that GAC has had neither the federal arbitration provided in the

contract between GAC and UNC nor a trial on the merits in the state court. Instead, an enormous judgment has been entered against GAC, and that judgment, as well as all other rulings made by the Santa Fe judge, are being invoked by UNC as *res judicata* before the arbitration panel and before federal courts in New Mexico and California where UNC has been endeavoring, in a barrage of lawsuits, to delay, hinder and otherwise defeat GAC's access to federal arbitration.

1. *The Origins of the Litigation*

A long-term supply agreement signed in 1973 obligated UNC to deliver approximately 24 million pounds of uranium at specified contract prices to GAC by the mid-1980's.[3] Although the market price for uranium had been relatively stable for several years prior to 1973, it rose suddenly in 1974 and 1975, and has been rising gradually since then.[4] By mid-1975, UNC was seeking to avoid continued performance under the 1973 agreement. UNC instituted an action in the New Mexico state courts in August 1975

[3] Between 1965 and May 1971, UNC committed itself directly to four utilities to sell in excess of 25 million pounds of uranium. UNC's utility agreements (in the form of three formal contracts and two letter agreements) were assigned to GAC's predecessor in 1971. In conjunction with that assignment, UNC agreed in 1971 to supply to GAC's predecessor the uranium necessary to fulfill those utility agreements. The 1973 Supply Agreement superseded the 1971 Agreement. It called for UNC to supply the quantity of uranium that was contemplated in 1973 to be necessary to perform those utility agreements, substantially in accordance with the terms and conditions, including price, of those agreements.

[4] UNC stated in March 1978—after the New Mexico trial court had rendered judgment in its favor—that instead of selling the uranium involved at the average contract price of $11 per pound, the judgment would enable it to sell at "current or future market prices." It noted that the market price was then approximately $43 per pound. See Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 77-1269, p. 66a. In a recent interview published in *The New York Times*, UNC's Chief Executive Officer has predicted that the price of uranium will rise to $70 to $80 per pound by 1983. See *The New York Times*, May 17, 1979, p. D4. UNC's calculation of current market prices brings the value of the default judgment to approximately one billion dollars, and the prediction regarding future market prices means that it may be worth substantially more.

for a declaratory judgment that the 1973 Supply Agreement was either wholly unenforceable or subject to reformation.

2. *UNC Resists Removal to Federal Court.*

Named as defendants in UNC's action were GAC (which is a partnership), as well as its constituent partners, Gulf Oil Corporation ("Gulf") and Scallop Nuclear, Inc. The complaint alleged that before GAC was organized, Gulf had engaged in fraud, breached its fiduciary duty, and violated state antitrust statutes in its dealings with UNC. It also alleged that performance of the agreement was commercially impracticable. Since diversity of citizenship existed between Gulf and UNC, Gulf removed the entire case to federal court. UNC moved for a remand. After it appeared during oral argument that the case might not be remanded, UNC avoided federal jurisdiction by voluntarily dismissing the pending action pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.[5]

[5] The New Mexico Supreme Court erred in its recitation of this event by declaring (and emphasizing) that GAC "opposed" the dismissal of the case in federal court (p. 4a, *infra*). GAC had no opportunity to oppose the dismissal. Under Rule 41(a)(1), UNC had an absolute right, since the defendants had not yet answered, to dismiss the action by simply filing a notice—which is precisely what it did.

A second state-court proceeding—the present case—was begun by UNC on December 31, 1975, the same day on which UNC dismissed the action in federal court. To avoid removal, only GAC was named as a defendant, but the complaint was otherwise identical to the one filed in August 1975. Since the 1973 Supply Agreement subjected to arbitration "any disputes, which may arise between the parties during the course of this Agreement,"[6] GAC prefaced preliminary motions filed during the first months of the litigation with an explicit statement that it was not waiving its right to demand arbitration.[7]

3. *The State Court Unlawfully Assumes Exclusive Jurisdiction.*

UNC, however, took steps to restrict the dispute to state court. Expressing concern that GAC would seek to join it in federal court proceedings involving the utilities to whom uranium had originally been promised by UNC,[8] UNC secured an *ex parte* temporary

[6] The text of the arbitration clause appears as Appendix D to this Petition, p. 54a, *infra*.

[7] A similar reservation of the right to seek arbitration was included in an interpleader complaint filed by GAC in federal court in New Mexico in January 1976. The interpleader suit was dismissed for lack of interpleader jurisdiction, and the dismissal was affirmed by the Court of Appeals for the Tenth Circuit, which recognized, however, that GAC was placed "in a most difficult trap" and that it faced the real possibility of "conflicting adjudications." *General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53, 56 (1977). This Court also observed, in its first opinion, that the New Mexico litigation left GAC "exposed to a substantial risk of inconsistent adjudications in separate proceedings." 434 U.S. at 18, n.11.

[8] Indiana & Michigan Electric Co. ("I & M"), the other party in this case, had initiated a lawsuit in the United States District

restraining order from the state court judge, Edwin L. Felter, prohibiting GAC from "instituting suit or filing a third-party complaint" against UNC in any other forum.

GAC thereafter notified UNC that it expected to join UNC in a federal arbitration pending with Duke Power Co., one of the utilities. Accordingly, in a hearing, held on March 24, 1976, on whether the preliminary injunction should issue, UNC asked the court to extend the prohibition entered nine days earlier against litigation in other forums to cover not only judicial proceedings, but arbitrations as well. On April 2, 1976, following announcement of his decision in a letter of March 29,[9] the Santa Fe judge entered the first of the injunctions subsequently held by this

Court for the Southern District of New York against GAC and its partners. *Indiana & Michigan Electric Co.* v. *Gulf Oil Corp.*, No. 76 Civ. 881 (S.D.N.Y.). I & M refused to join UNC, and that action was ultimately dismissed on January 5, 1977, when District Judge Frankel concluded that to continue the lawsuit without UNC as a party would violate "equity and good conscience." Thereafter, I & M was joined as a party in the New Mexico court and has aligned itself with UNC in the conduct of the litigation.

[9] The New Mexico Supreme Court plainly erred when it stated that UNC had not requested an injunction against arbitration and that the "first indication" that arbitration might be enjoined was a statement made by the trial judge in court on April 2, 1976 (p. 6a, *infra*). The court overlooked totally the proceedings of March 24, 1976, during which UNC's counsel explicitly asked that the order be expanded to cover arbitration (Transcript of proceedings, March 24, 1976, p.17). Its attorney also said at the time that he was concerned that UNC would be joined in "I don't know how many unknown places, in arbitration and other proceedings" (*Id.* at 18). Moreover, the New Mexico Supreme Court took GAC to task for its failure to "demand arbitration in the interim" between the trial judge's announcement of the terms of the preliminary injunction and the actual entry of the order—a period of four days (pp. 6a, 21a, *infra*). It hardly seems likely

Court to be unconstitutional. Dealing directly with the prospect of federal arbitration, the injunction said, in part (emphasis added):

> This injunction prohibits *the institution or prosecution of* ordinary litigation, third party proceedings, cross-claims, *arbitration proceedings* or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto.

4. *GAC Seeks Immediate Appellate Review.*

GAC proceeded immediately to obtain appellate review of the trial judge's preliminary injunction by seeking a writ of prohibition in the New Mexico Supreme Court. That court entertained GAC's application and heard oral argument. On June 16, 1976, however, the New Mexico Supreme Court denied the requested writ without opinion. GAC then petitioned to this Court for a writ of certiorari.

In the meantime, because it was under an outstanding court order prohibiting it from instituting or prosecuting "arbitration proceedings," GAC participated in the New Mexico litigation to protect its position if its challenge to the injunction were ultimately rejected. It included compulsory counterclaims in its answer, joined the utilities as additional defendants, engaged in discovery, and filed and responded to all appropriate motions.

that GAC's rights under the Federal Arbitration Act could be deemed "waived" because GAC failed to engage in the very questionable practice of serving an arbitration demand after it had been formally advised by the judge that an injunction would shortly be entered prohibiting precisely this conduct.

5. *GAC Continues To Invoke the Right To Arbitrate.*

UNC responded to GAC's petition in this Court by arguing that the New Mexico Supreme Court's refusal to issue a writ of prohibition had rested on adequate and independent state grounds. This Court thereupon vacated the judgment and remanded the case to the New Mexico Supreme Court for a clarification as to "whether judgment is based upon federal or state grounds, or both." *General Atomic Co.* v. *Felter*, 429 U.S. 973. The New Mexico Supreme Court filed an opinion almost three months thereafter, indicating, contrary to UNC's assertion, that it had decided the case on federal grounds, but ruling again adversely to GAC. 90 N.M. 120, 560 P.2d 541 (1977).[10] GAC's May 1977 petition to this Court to review that judgment complained specifically, in four pages of argument, about the effect of the trial judge's injunction on GAC's "federal rights to arbitration of disputes." Petition for a Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 20-24.

On October 31, 1977, this Court ruled summarily that the preliminary injunction was unconstitutional. *General Atomic Co.* v. *Felter*, 434 U.S. 12. With ref-

[10] The unanimous opinion was written by the late Justice McManus, who did not participate in subsequent phases of this case. The concurring judges were Justices Sosa, Easley and Payne, who comprised the three-judge panel which issued the decision which is the subject of this petition.

erence to arbitration, this Court said that GAC had "every right to attempt ... under ... the Federal Arbitration Act" to defend itself by bringing UNC into "federal arbitration proceedings." 434 U.S. at 18.

6. *The Trial Judge Delays Effectuation of This Court's Ruling.*

Coincidentally, the trial judge had scheduled the trial on the merits to begin on October 31, 1977, and he adhered to his schedule, refusing to pause even after being advised of this Court's decision of that date.[11] When GAC requested orally on November 3 and 7 that the Santa Fe judge vacate the preliminary injunction immediately so that arbitration could be pursued, UNC's counsel (who had been a Justice of the New Mexico Supreme Court until June 1976)[12]

[11] In the course of colloquy on the decision, the trial judge advised counsel that while he would "comply with any mandate from the New Mexico Supreme Court or the United States Supreme Court" because "[t]he law requires that," it was his view that "[t]he law does not require that we agree with the appellate decisions." The judge advised counsel, "I happen to agree with the opinion of Justice Rehnquist" (who had dissented). Transcript of November 7, 1977, p. 5/46.

[12] Details regarding the chronology of the resignation of UNC's counsel from the New Mexico Supreme Court and contemporaneous news reports regarding his participation in this litigation were provided in GAC's first petition for a writ of certiorari. Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter,* No. 76-385, pp. 9-10, n.**. See also Brief in Opp., p. 10, n.7. GAC also moved in the course of the litigation in the New Mexico courts to disqualify the law firm representing UNC on the ground of conflict-of-interest because that firm had represented Gulf in the development of a uranium mine in New Mexico which played a part in UNC's allegations in this case. The disqualification motion was denied by the trial judge, and that denial is one of the issues now pending on appeal in the New Mexico Supreme Court. On the very same facts relating to the firm's conflict of

insisted that no action should be taken until the New Mexico Supreme Court formally sent its mandate to the trial court. Despite the fact that this Court had held that the injunction was illegal, he insisted to the trial judge, on UNC's behalf, "We feel that we need the protection of that injunction more than ever." Transcript of Proceedings, Nov. 7, 1977, p. 5/35. The trial judge then denied GAC's request, left the injunction in effect, and proceeded with the trial, which was only in its fifth day.

7. *GAC Serves Its Arbitration Demand.*

Almost a full month after the Santa Fe judge persisted in continuing the trial and 20 months after the entry of the illegal injunction, GAC was finally given an opportunity to demand federal arbitration. Judge Felter received the formal mandate of the New Mexico Supreme Court on November 28, 1977, and then "modified" his preliminary injunction by "excluding from its terms and conditions all *in personam* actions in federal courts and all other matters mandated to be excluded from the operation of the preliminary injunction by the opinion of the Supreme Court, dated October 31, 1977." On the following day, November 29, 1977, GAC filed with the American Arbitration Association in San Diego, California, a demand for arbitration with UNC of issues growing out of the 1973 Supply Agreement.[13] It also made arbitration

interest, the Seventh Circuit held that the firm was disqualified from representing UNC in related litigation pending in federal court in Chicago. *Westinghouse Electric Corp.* v. *Gulf Oil Corp.,* 588 F.2d 221 (1978).

[13] The New Mexico Supreme Court initially stated in the fourth paragraph of its opinion: "The trial had been in progress almost sixty days when the U.S. Supreme Court mandate came down."

claims against UNC in connection with two pending arbitrations under the utility agreements which had been assigned by UNC. One day later, GAC moved that the Santa Fe trial be stayed pending completion of these federal arbitrations. UNC responded with a cross-motion, accompanied by proposed findings and a proposed partial final judgment, requesting a stay of all three arbitrations. UNC relied in these papers exclusively on the New Mexico Arbitration Act, N.M.S.A. §22-3-9, *et seq.*

8. *The Trial Judge Again Unlawfully Bars Arbitration.*

On December 16, 1977, Judge Felter denied GAC's requested relief and granted UNC's. His written decision was a verbatim reproduction of the proposed findings and conclusions which UNC had submitted, and he accepted totally UNC's proposed partial final judgment. Although he refused an evidentiary hearing, he concluded, as requested by UNC, that GAC had "waived" and was "in default" of its federal ar-

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This was subsequently corrected, *sua sponte*, to read "The trial had been in progress several days when the U.S. Supreme Court mandate came down . . ." (p. 2a, *infra*). The New Mexico Supreme Court did not, however, correct the statement later in its opinion that "[t]he district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings" (p. 33a, *infra*). Nor did it correct the equally erroneous statement that "GAC did not properly manifest its intention or desire to arbitrate . . . to a point well into the trial of the second case" (p. 26a, *infra*). As previously noted, GAC asked twice, during the first week of trial and before any substantive witnesses had been called, that the injunction be vacated immediately so that arbitration could proceed.

bitration rights. The basis for this conclusion was that "[a]t no point between the commencement of the first action . . . and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement."[14] Based on this finding of waiver, Judge Felter stayed the prosecution by GAC of claims against UNC relating to the two utility arbitrations, as well as the San Diego arbitration. This judgment was later to be disapproved by this Court and described as "inconceivable" in the Court's decision of May 30, 1978, on GAC's Motion for Leave to File Petition for Writ of Mandamus. 436 U.S. 493, 497.

Having stayed the arbitrations initiated by GAC, the Santa Fe court naturally declined to stay its own trial in favor of these arbitrations. The judge entered a minute order to this effect on December 16, 1977. To facilitate appellate review, GAC requested that this order be rendered in the form of an appealable "partial final judgment." UNC responded by again submitting a decision and form of judgment for the

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[14] Substantially the same findings and conclusions were entered when the Santa Fe court entered its partial final judgment refusing to stay its trial (the subject of this petition) on December 27, 1977. See pp. 50a, 46a, *infra*. Indeed, the only significant difference between the December 16 and 27 decisions was that the judge, at UNC's suggestion, stated in his December 27 decision that he may have jurisdiction under the Federal Arbitration Act. In his earlier ruling, he had adopted UNC's legal conclusion—contested by GAC—that only state law applied. See p. 50a, *infra*.

court's signature, and the trial court again entered UNC's proposals. The decision entered on December 27, 1977, which is the subject of this petition, was substantially identical to the decision of December 16.

9. *The Trial Concludes Suddenly With a Default Judgment.*

GAC then appealed to the New Mexico Supreme Court from Judge Felter's orders of December 16 and 27, and also sought prompt remedial action in this Court to permit the arbitration proceedings initiated by GAC to continue. While GAC's pleadings to be filed in this Court were in their final stages, Judge Felter precipitously terminated the trial on March 2, 1978 (before UNC had even completed presentation of its case) and thereafter entered default judgments in favor of UNC and I & M.[15]

[15] The default was based upon GAC's failure to produce, allegedly in bad faith, information and documents belonging to a Canadian subsidiary of Gulf (not a party to the Santa Fe litigation) which related to a "cartel" of foreign governments and uranium producers. The documents were located in Canada, and their production, or disclosure of information derived from them, would have subjected those responsible to severe criminal sanctions under Canadian law. Appeals from these judgments have been briefed and argued before the New Mexico Supreme Court and are now awaiting decision. Petitions for certiorari seeking immediate relief, prior to review by the New Mexico Supreme Court, with regard to the order directing disclosure of the foreign documents and with regard to the default were filed with this Court in March 1978 and were denied. *General Atomic Co.* v. *Felter*, Nos. 77-1236 and 77-1269, *certiorari denied*, 436 U.S. 904 (1978). GAC has contended in the New Mexico Supreme Court that the default judgments and the orders leading up to them are unprecedented interferences with foreign relations with a friendly neighbor and present serious constitutional issues under the Due Process Clause and the constitutional doctrines relating

10. *This Court Grants Extraordinary Relief.*

On May 30, 1978, this Court granted GAC's Motion for Leave to File Petition for Writ of Mandamus, holding that Judge Felter's order staying the arbitrations was in violation of this Court's prior mandate.[16] This Court's opinion reaffirmed GAC's right to present its arbitration claims in federal forums, including the San Diego arbitration and other arbitration proceedings that had been stayed illegally by the Santa Fe court (436 U.S. at 496; footnote omitted):

> In its order of December 16, 1977, the Santa Fe court has again done precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration.

This Court went on to say (436 U.S. at 497):

> [W]e have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other

to the allocation of functions between the national government and the states and between the Executive and Judicial branches. They have been the subject of a series of Diplomatic Notes served on the United States by the Government of Canada, and an *amicus curiae* brief filed in this Court.

[16] The pleadings of both parties had addressed the December 16 and December 27 decisions, which contained virtually identical findings and conclusions, on the assumption that they would stand or fall together. But this Court did not disturb the December 27 order—the refusal to stay the Santa Fe trial—on the ground that this second order did not, in and of itself, restrict GAC from "pursuing its arbitration claims in other forums." 436 U.S. at 498, n.2. Since the only issue before the Court on GAC's mandamus petition was whether Judge Felter had disobeyed the earlier mandate, the Court apparently was prepared to review at that time only such orders as directly prohibited arbitration.

reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums.

11. *Arbitration Begins After UNC's Action for an Injunction is Dismissed.*

After this Court's ruling, the American Arbitration Association ("AAA") indicated that it would proceed with the arbitration demanded by GAC. UNC first threatened the AAA and then instituted a lawsuit against it in the New Mexico federal district court to enjoin the arbitration. UNC contended that Judge Felter's conclusion that arbitration had been waived, as well as his default and declaratory judgments holding the Supply Agreements invalid, were entitled to *res judicata* effect and had to be accorded Full Faith and Credit. For that reason, UNC contended, the arbitration could not proceed. UNC's complaint was dismissed by the District Court on September 27, 1978. *United Nuclear Corp.* v. *American Arbitration Association*, No. 78-522. In its opinion, the district court stated that any claim of *res judicata* or Full Faith and Credit could be presented to, and decided by, the panel of arbitrators. Although UNC moved for reconsideration of that decision and, on denial, filed a notice of appeal, it subsequently dismissed the appeal voluntarily.

The panel of arbitrators convened in Chicago, Illinois, on December 13, 1978, and January 25–26, 1979. It solicited written submissions from the parties and convened again for four days of argument on "preliminary issues" in San Diego, California, on March 26–29, 1979. Although UNC had enumerated fourteen "preliminary issues" in its first submission to the

arbitrators, it later refused to brief or argue orally any issue other than whether the arbitrators were compelled by law to accord *res judicata* effect and grant Full Faith and Credit to the conclusion of Judge Felter that GAC had waived its right to arbitrate and to his declaratory judgment, based on the default, that the 1973 Supply Agreement was invalid. When the arbitration panel indicated that it intended to hear the scheduled argument on other issues, UNC walked out of the proceeding and instituted another lawsuit against GAC and the arbitrators in the United States District Court in San Diego to stop the arbitration. Again UNC contended, *inter alia*, that Judge Felter's findings were conclusive. Although no preliminary injunction was requested, the arbitration panel, out of respect for the district court, suspended its proceedings while the lawsuit was pending. The district court dismissed the complaint on July 3, 1979, for lack of federal-question jurisdiction, but considered seriously UNC's argument that the doctrine of Full Faith and Credit might apply to Judge Felter's waiver findings. *United Nuclear Corp.* v. *General Atomic Co.*, Civ. No. 79-329-E (S.D. Calif.). On July 16, 1979, UNC filed a motion to reopen the judgment and permit it to amend its complaint, and that motion is pending at the time this petition is filed.

12. *The New Mexico Supreme Court Rules That GAC Waived Arbitration.*

The decision of the New Mexico Supreme Court which is the subject of this petition affirmed Judge Felter's finding of waiver. In reviewing that question, which the court held was properly an issue for the trial judge and not for the arbitration panel, the court placed great emphasis on GAC's conduct *after* the

date on which the injunction had been issued. It said (p. 19a, *infra*):

> Thus, we examine not only the acts of GAC that occurred prior to the time the injunction was entered on April 2, 1976, but the conduct or inaction of GAC thereafter as bearing on the real designs of the company.

The court affirmed the finding that arbitration had been waived on the ground that GAC had not expressed "its intention or desire to arbitrate rather than litigate" in the period between the institution of the action and November 29, 1977.[17] It said (p. 27a, *infra*):

> This complex, multi-party, multi-issue litigation was within days of final solution at the trial level when the first *demand* was made for arbitration. This very simple act of stating, in writing: "We want to arbitrate", followed by a motion for a stay of litigation, would have challenged the jurisdiction of the court to proceed. Our search of the record reveals no instance where these words were either written or spoken until November of 1977.[18]

[17] Since it overlooked the oral requests GAC counsel had made in the first five days of trial (November 3 and 7, 1977) that the injunction be removed so that arbitration could proceed, the New Mexico Supreme Court repeatedly asserted that even after this Court's decision of October 31, 1977, GAC did not express its desire to arbitrate until November 29, 1977.

[18] The court was, of course, plainly in error in suggesting that the litigation "was within days of final solution" when the demand for arbitration was served (on the day following removal of the injunction). The trial continued for three months after November 29, 1977, and the plaintiff's case had not yet been concluded when Judge Felter precipitously terminated it. The court was also in error in stating that GAC had never said, "We want to arbitrate." As recounted previously (pp. 11-12, *supra*), the prohibition against arbitration was added to the injunction precisely because GAC announced its intention to join UNC to an ongoing arbitration.

The New Mexico court also found (p. 25a, *infra*):

> that the court and UNC were misled into believing that GAC intended to litigate the issues and that its intent to arbitrate was not as strong as it now contends.[19]

With regard to the prohibition of the preliminary injunction, the New Mexico Supreme Court brushed it aside (p. 22a, *infra*):

> There is nothing in the preliminary injunction that prohibited GAC from demanding arbitration at any time by serving a demand on UNC in New Mexico, without regard for the location at which the arbitration would take place.

Underlying the decision was the New Mexico Supreme Court's novel proposition of law—supported by no authority whatever—that arbitration under the Federal Arbitration Act could not proceed unless Judge Felter was willing to stay his trial (p. 33a, *infra*):

> There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding

[19] In concluding that UNC had been "misled into believing" that GAC was not interested in arbitrating, the New Mexico Supreme Court ignored totally the pleadings filed in this Court, which made GAC's wish to arbitrate entirely clear. It also ignored the proceedings of March 24, 1976, which it apparently overlooked entirely (note 9, *supra*). In that hearing, GAC's efforts to secure arbitration were discussed and became the basis for the request that arbitration be enjoined. GAC also requested, on November 3 and 7, 1977, that the injunction against arbitration be immediately vacated.

with arbitration without an order from Judge Felter. 9 U.S.C. §3.[20]

Finally, the court held that issues of New Mexico antitrust law which had been raised by UNC were not arbitrable under the Federal Arbitration Act. It relied upon a number of decisions by federal courts of appeal which had held that *federal* antitrust claims are not arbitrable, and the New Mexico Supreme Court concluded that "federal and state antitrust laws protect the same interests of society. . . ." (p. 40a, *infra*). The court below then ruled that all other disputed issues were "intertwined" with nonarbitrable state antitrust questions, so that the entire dispute was not arbitrable.

REASONS FOR GRANTING THE WRIT

The judgment below perpetuates an injustice in this very important case by again interfering with, impeding,and frustrating GAC's access to federal arbitration—a right which GAC secured in this Court "after a lengthy process of litigation, involving several layers of courts" (436 U.S. at 497), and which thereafter had to be enforced by this Court through the extraordinary procedure of mandamus. Meaningful implementation of this Court's two rulings requires reversal of the decision of the New Mexico Supreme Court because that decision threatens to achieve indirectly the same restriction against arbitration which this Court invalidated when the courts below attempted to impose it directly.

[20] The obvious unsoundness of this proposition is discussed at p. 32, *infra*. It means that a state judge could effectively enjoin federal arbitration by simply refusing to stay his trial.

Review by this Court is warranted, however, not only because the result of the New Mexico litigation is unjust and undermines the letter and spirit of this Court's earlier rulings, but also because the New Mexico Supreme Court has arrived at its judgment by misapplying the Federal Arbitration Act in important respects. Even if this case had not already been the subject of two summary decisions of this Court, the federal legal questions presented by the decision of the New Mexico Supreme Court would be sufficiently significant to warrant review here. The conclusions of the New Mexico courts conflict with rulings of this Court and lower federal courts in the area of federal arbitration, and these federal issues deserve clarification and authoritative resolution by this Court.[21]

1. *The "waiver" finding nullifies and evades this Court's prior rulings in this case.*

The principal reason why certiorari should be granted and the judgment below reversed is that UNC and the New Mexico courts are now attempting to accom-

[21] The New Mexico Supreme Court's affirmance of the Santa Fe court's December 27, 1977, partial final judgment constitutes a decision, by New Mexico's highest court, that the controversy between UNC and GAC should be resolved in state court, rather than in a federal arbitration. That decision is subject to no further review in New Mexico's court system. Further, the subject of the decision—GAC's right to federal arbitration—is a separate and independent matter, anterior to the merits of the underlying controversy between UNC and GAC, and not enmeshed in the factual and legal issues comprising UNC's cause of action. The New Mexico Supreme Court's decision is, therefore, a "final judgment" for purposes of this Court's jurisdiction under 28 U.S.C. §1257. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963); *American Motorists Ins. Co.* v. *Starnes*, 425 U.S. 637, 642 n.3 (1976). *See Local No. 438, Construction and General Laborers' Union* v. *Curry*, 371 U.S. 542, 548-52 (1963).

plish the very same result—barring GAC's right to arbitrate—which this Court resoundingly condemned twice on earlier occasions. Rather than "enjoining" GAC's prospective arbitrations, as Judge Felter unlawfully did on April 2, 1976, or "staying" arbitrations initiated by GAC, as he attempted unlawfully to do on December 16, 1977, the trial judge has now endeavored to prevent GAC's arbitrations by declaring that GAC has "waived" that federal right. Since the asserted "waiver" was, in fact, GAC's compelled obedience to Judge Felter's injunction, the finding of "waiver" cannot stand without according validity to the unlawful injunction itself. If the decision below is not vacated, the injunction will have had the same practical force and effect as if it had been upheld by this Court. The New Mexico Supreme Court has said, in substance, that although it was unlawful for Judge Felter to enjoin GAC from instituting federal arbitration or to stay arbitrations which had been demanded, GAC's compliance with Judge Felter's injunction—*i.e.*, its failure to institute arbitration while the injunction prohibited it from doing so—forever bars GAC from invoking that remedy. It would thus be a Pyrrhic victory that GAC has twice earned in this Court.

(a) *GAC's compliance with the injunction.*—During the time GAC was enjoined, it had no choice but to forswear federal arbitration temporarily and defend, as vigorously as possible, the litigation in Santa Fe which UNC had instituted.

This Court's decisions in *Howat* v. *Kansas*, 258 U.S. 181 (1922), and *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), required GAC to take the course it did. A party subject to an assertedly unlawful order

by a state court must comply with it while seeking its reversal in accordance with orderly state appellate procedures. As this Court held in *Howat* (258 U.S. at 189-90) and reaffirmed in *Walker* (388 U.S. at 314):

> An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.[22]

Having been enjoined from instituting federal arbitration, GAC could serve no demand for such arbitration without violating Judge Felter's order. Its obedience to the order cannot constitute the voluntary and deliberate relinquishment of a known right which is the earmark of a true waiver. *E.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Marchetti* v. *United States*, 390 U.S. 39, 51-52 (1968); *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

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[22] Similarly, in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968), this Court observed that demonstrators who had complied with state court orders prohibiting proposed rallies while taking appeals had "pursued the course indicated by *Walker*." This Court explained that the "proper procedure" is "to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity."

(b) *The meaning of the injunction.*—The New Mexico Supreme Court sought to overcome the obvious flaw in Judge Felter's reasoning by denying that GAC had been enjoined from demanding arbitration (pp. 22a, 33a, *infra*). According to the New Mexico Supreme Court, GAC could have proceeded to arbitration by serving a demand on UNC in Santa Fe and applying to Judge Felter for a stay of the trial. This novel interpretation of the preliminary injunction is contrary to its plain language, which prohibited the "institution or prosecution of . . . arbitration proceedings . . . ." It is also contrary to the history which led to the restraint on arbitration, to the premise of this Court's decisions, and to the expressed understanding of the parties after the injunction was reversed by this Court.

(i) The origin of the restraint on arbitration refutes the contention that GAC could have demanded that UNC arbitrate under AAA rules in San Diego. GAC advised UNC in March 1976 that it intended to bring UNC into a pending arbitration between Duke Power Co. and GAC, and the injunction's restriction against arbitration was added to Judge Felter's order at UNC's request precisely to prohibit this and all other arbitration claims. There can be no doubt, therefore, that if GAC had demanded arbitration with UNC anywhere other than in Judge Felter's jurisdiction and under his "supervision" (see pp. 30-31, *infra*), such an action would have opened it to contempt sanctions.[23]

[23] Indeed, UNC moved immediately for punitive measures against GAC when, between May and July 1976, GAC merely notified UNC in a series of letters of the Duke arbitration and attempted to "vouch" UNC into the proceeding. The trial judge denied UNC's requested sanction, but only because the "mere giving of notice . . . and a request to undertake defense" did not go far enough to constitute the "institution or prosecution" of arbitration.

(ii) The novel interpretation of the New Mexico Supreme Court plainly conflicts with the premise on which this Court issued its decisions of October 31, 1977, and May 30, 1978. This Court said in its first decision that GAC had been prevented by the preliminary injunction from asserting rights in "federal arbitration proceedings." This Court also said that "[t]he injunction has also prevented GAC from asserting claims against UNC under the arbitration provision of the 1973 uranium supply agreement in the pending arbitration proceeding instituted against GAC and UNC by Commonwealth. . . ." 434 U.S. at 18, n.11. These statements squarely contradict the New Mexico Supreme Court's assumption that "nothing in the preliminary injunction . . . prohibited GAC from demanding arbitration at any time. . . ." (p. 22a, *infra*).

When the case had to come to this Court again on GAC's Motion for Leave to File Petition for Writ of Mandamus, this Court reiterated that the preliminary injunction prevented GAC from demanding federal arbitration. Although UNC argued, in response to GAC's petition, that GAC had been free to arbitrate by merely moving to stay the trial before Judge Felter,[24] this Court held that the stay of December 1977 had, like the preliminary injunction, "interfere[d] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. Thus the premise now utilized by the New Mexico

[24] Brief for Respondent in Opposition, No. 77-1237, p. 22.

Supreme Court—*i.e.*, that the injunction did not interfere with demands for federal arbitration—was squarely rejected by this Court on the case's most recent appearance here.

(iii) Finally, UNC did not suggest at any time prior to November 29, 1977, that GAC was free to demand federal arbitration in San Diego. To the contrary, UNC had sharply contended that even a "vouching in" notice violated the injunction. See note 23, *supra*. And when GAC argued in its May 1977 petition for a writ of certiorari that its access to arbitration rights under the Federal Arbitration Act was totally foreclosed by the injunction, UNC did not respond that GAC could arbitrate in San Diego by merely serving a notice.[25] Nor did UNC or the trial court suggest that the institution of federal arbitration was permitted when, in early November 1977, GAC stated that it wished to proceed with arbitration and asked for immediate modification of the injunction to permit it to do so. Instead, UNC's counsel told the District Judge, "We need the protection of the injunction more than ever." See p. 15, *supra*. Thus, UNC's own understanding is very persuasive refutation of the New Mexico Supreme Court's singular interpretation of the injunction.

The fact that the injunction prohibited only the institution of arbitration "in any other forum" and that Judge Felter had told GAC counsel that arbitration would be permitted "subject to the supervision of this Court" only proves that the judge and the parties understood that arbitration in another forum (such as San Diego) or under the "supervision" of some other court was plainly prohibited. The rights granted by the Federal Arbitration Act are not, of course, limited to the "forum" where one party initiates state-court litigation. Nor is federal arbitration conducted "subject to the supervision" of a judge of a state court. These limitations on GAC's right to arbitrate demonstrate that its federal rights were clearly enjoined.

(c) *Evading this Court's decisions.*—The necessary effect of the decision of the New Mexico Supreme Court is to nullify GAC's constitutional and statutory protection vindicated by decisions of this Court. This Court has held, in no uncertain terms, that the efforts to prevent federal arbitration of the dispute between GAC and UNC were unlawful, and has even taken the extraordinary measure of granting leave to file a petition for writ of mandamus to override promptly the Santa Fe court's effort to impede federal arbitration by issuing a "stay" of those proceedings. The New Mexico courts' invocation of a "waiver" rationale (which was also the basis for the "stay" which this Court found illegal) is no more legitimate than were the earlier grounds of decision utilized by the lower courts to achieve the same end. If this Court's ruling of October 31, 1977, had been implemented according to its letter and spirit, the injunction would have been lifted expeditiously and petitioner would have been afforded a full opportunity to exercise the rights unlawfully denied for almost 19 months. Instead, the New Mexico courts, at UNC's instance, have given this Court's decisions only the most grudging literal

[25] Compare Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 20–24, with Brief in Opposition to Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 6–11. See also Petitioner's Reply in Support of Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, pp. 6–9.

reading, and have now concluded that compliance with the injunction amounted to a waiver of the rights of arbitration.

Indeed, the erroneous legal conclusion of the New Mexico Supreme Court that GAC could not proceed to federal arbitration "without an order from Judge Felter" (p. 33a, *infra*) leads inevitably to the same unlawful result that this Court repudiated when it overturned Judge Felter's two earlier interferences with federal arbitration. If a stay order from a local judge is a necessary precondition under the Federal Arbitration Act, any local judge could effectively enjoin arbitration by refusing to stay his trial. Under this legal rule, the denial of a requested stay would be the equivalent of an injunction against federal arbitration—an order which, under this Court's decisions, would be patently unconstitutional.

This Court's observations, in the course of its decision of May 30, 1978, that its "prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate" and that its "prior decision [did not] prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums" (436 U.S. at 497) were not, of course, approvals or authorizations of any waiver findings or refusals to stay. The issue before this Court on GAC's Motion for Leave to File Petition for Writ of Mandamus was only whether Judge Felter had "refused or failed to comply with" this Court's rulings. Limiting its relief to the precise remedy appropriate for mandamus, this Court observed that the "prior opinion" or "prior decision" did not, in and of itself, foreclose waiver findings or

judgments regarding a stay of the trial. Those issues are, however, presented now, on the full record before the trial judge, and, for reasons stated herein, the decision entered by Judge Felter is plainly erroneous.

2. *The "waiver" finding conflicts substantively and procedurally with appellate decisions of federal courts under the Federal Arbitration Act.*

In addition to nullifying this Court's earlier rulings in this very same litigation, the decision of the New Mexico Supreme Court that GAC had waived its fedeal arbitration rights by not invoking them in the manner suggested by the opinion conflicts squarely with the line of federal decisions governing the standards for waiver of federal arbitration rights. Moreover, by entering the waiver finding after refusing to hold an evidentiary hearing, Judge Felter violated both the Federal Arbitration Act and the Due Process of Law guarantee of the Fourteenth Amendment.

(a) *The delay in demanding arbitration.*—The New Mexico courts concluded that GAC had waited too long before demanding arbitration. Recognizing that findings that a party has waived federal arbitration rights are disfavored (pp. 13a–14a, *infra*), the New Mexico Supreme Court still found that there had been a waiver notwithstanding GAC's repeated express reservations of the right to demand arbitration and the immediate assertion of that right once the unlawful injunction was removed. The uniform rule in the federal courts has been that the very earliest time that a defendant in a civil action need elect whether to proceed with litigation or demand arbitration is when he joins issue by filing an answer to the complaint.

E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Lecopulos,* 553 F.2d 842, 845 (2d Cir. 1977); *Chatham Shipping Co.* v *Fertex Steamship Corp.,* 352 F.2d 291, 293 (2d Cir. 1965) (Friendly, J.); *Hilti, Inc.* v. *Oldach,* 392 F.2d 368, 371 (1st Cir. 1968). This implements the overriding federal policy favoring arbitration, under which waivers of the statutory right are not lightly inferred. *E.g., Sibley* v. *Tandy Corp.,* 543 F.2d 540, 542 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977); *Gavlik Construction Co.* v. *H.F. Campbell Co.,* 526 F.2d 777, 783 (3rd Cir. 1975); *Hart* v. *Orion Ins. Co.,* 453 F.2d. 1358, 1360 (10th Cir. 1971); *Carcich* v. *Rederi A/B Nordie,* 389 F.2d 692, 696 (2d Cir. 1968).

GAC had been given until May 6, 1976, to answer the UNC complaint. Consequently, it had the right under established federal law to defer until that date its decision whether or not formally to invoke the arbitration clause of the 1973 Supply Agreement by serving a demand for arbitration upon UNC. More than a month before its answer was due, GAC was enjoined from demanding federal arbitration.[26] Consequently, it was never given the time allowed by the Federal Arbitration Act, as consistently interpreted by the federal courts, in which to make its statutory decision whether to arbitrate.

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[26] The New Mexico Supreme Court was wrong in claiming that UNC was prejudiced by GAC's failure to file an arbitration demand and that this supported a finding of waiver. The fact that UNC, like GAC, had spent millions of dollars preparing for trial was not attributable to any delay by GAC. UNC procured and vigorously defended the illegal order which caused the judicial proceedings and their heavy expenses to continue. A party may not complain of prejudice from an illegal order which *it procured.*

(b) *Participation in litigation.*—Nor did GAC's active participation in the Santa Fe litigation amount to a waiver of its right to arbitrate. What GAC did after it was enjoined from seeking relief in other forums constituted "purely necessary defensive action[s]" within the rule applied by this Court in the analogous context of *The Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1, 20 (1972). The issue in the *Bremen* case was whether a contractual forum-selection clause vesting exclusive authority in a London court was enforceable. The party resisting the foreign forum contended that the institution of a limitation-of-liability lawsuit in the United States by its adversary amounted to a waiver of the foreign forum. This Court, noting the "dilemma" confronting a litigant faced by unavoidable delays in court processes and the uncertainties of litigation (407 U.S. at 5), said that the party instituting the local lawsuit "had no other prudent alternative but to protect itself by filing for limitation of its liability." 407 U.S. at 19. In this case as well, GAC's participation in the Santa Fe litigation during the pendency of the unconstitutional injunction constituted the only "prudent alternative" available to it. A waiver of arbitration under the Federal Arbitration Act cannot, for this reason, be based upon a party's protective stance in litigation which it challenges. In *General Guaranty Insurance Co.* v. *New Orleans General Agency,* 427 F.2d 924, 929 (5th Cir. 1970), a federal court of appeals held that there had been no waiver of arbitration by a party to litigation who participated fully in judicial proceedings while his claim to arbitration was *sub judice:*

> [I]t loses sight of the purposes and effects of arbitration . . . to treat the court proceedings as a sort of judicial tightrope which the party seeking arbitration walks at his peril.

(c) *Refusal of an evidentiary hearing.*—For the reasons previously stated, the finding that GAC had "waived" its right to arbitrate was, on the undisputed facts, demonstrably improper and erroneous, and should be reversed. Even if, however, an inquiry into GAC's "real designs" or "state of mind" was necessary (as the New Mexico Supreme Court believed, p. 19a, *infra*), a determination on such an issue could not constitutionally and lawfully be made without a full evidentiary hearing. The Second and the Ninth Circuits have held that critical factual determinations on contested allegations in cases arising under the Federal Arbitration Act may be made only after an evidentiary hearing. *A/S Custodia* v. *Lesin International, Inc.*, 503 F.2d 318 (2d Cir. 1974); *El Hoss Engineering & Transport Co.* v. *American Independent Oil Co.*, 289 F.2d 346 (2d Cir. 1961). These rulings effectuate the general constitutional principles of the Due Process Clause, as applied by this Court in cases such as *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Bell* v. *Burson*, 402 U.S. 535 (1971); and *Goss* v. *Lopez*, 419 U.S. 565 (1975). The decision of the New Mexico courts violated these principles.

3. *The New Mexico courts should have implemented this Court's decision by restoring the status quo ante.*

The decision of the New Mexico Supreme Court also conflicts with the constitutionally required remedy that the lower courts should have utilized to carry out this Court's decision invalidating Judge Felter's preliminary injunction. That injunction improperly barred a party to ongoing litigation (GAC) from federal forums which were constitutionally guaranteed. The opposing party (UNC) should not have been permitted to benefit in any way from the unlawful order which it had secured, and both parties should have been restored, immediately upon invalidation of the injunction, to the *status quo ante.*

As long ago as 1842, this Court held in *Gordon* v. *Longest*, 41 U.S. (16 Pet.) 97, 104 (1842), that when a state court has impermissibly refused to allow removal of a case within the jurisdiction of the federal court:

> every step subsequently taken, in the exercise of a jurisdiction in the case, whether in the same court or in the court of appeals, was coram non judice.

This Court held that the proper remedy in such a situation is to put the parties back to the status quo existing at the time that the state court unlawfully frustrated resort to the federal remedy. This rule has been followed by this Court in several other removal cases. *See Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454, 464 (1894); *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 17–19 (1951); cf. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). It has been applied by the Court of Appeals for the Fifth Circuit in the arbitration context. *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977).

In *Sibley*, a trial court held that the presence of nonarbitrable federal securities act issues in a dispute precluded arbitration of the dispute altogether. It then proceeded to trial on both arbitrable and nonarbitrable issues. After finding that the trial court had erred in not staying its trial in favor of arbitration, the Fifth Circuit reversed the judgment as to all issues, even those which could not, in any event, be referred to arbitration. The losing party sought a re-

hearing, and the panel then emphasized that the party which had erroneously urged that the dispute be resolved in court proceedings was not entitled to retain the benefits of that error (547 F.2d at 287):

> Parker, however, successfully urged upon the court its primary position that everything must be settled in court and that nothing could be arbitrated. It not only prevented arbitration's being first in time but also secured a declaration that foreclosed the possibility of arbitration's and trial's proceeding simultaneously. Having persuaded the court to choose a course 180 degrees off the correct one, Parker has little force to his argument that he should be permitted to enjoy the substantial benefits of a trial that should not have been held.

In this case, a necessary consequence of this Court's reversal of the unconstitutional preliminary injunction should have been the invalidation of all proceedings that were made possible by the injunction. Such relief would have vitiated the orders entered by Judge Felter, and particularly his extraordinary discovery and default decrees.

4. *The ruling that courts, and not arbitrators, decide whether arbitration has been waived conflicts with decisions of this Court.*

The New Mexico Supreme Court also misallocated the functions of courts and arbitration panels when it ruled that Judge Felter was authorized to decide whether GAC had waited too long in filing its arbitration demand. This Court's decisions have construed federal law as assigning to arbitration panels all factual issues relating to a party's alleged delay in demanding arbitration. Judge Felter's determination,

approved by the New Mexico Supreme Court, to render a judicial decision as to whether GAC "waived" its right to arbitration conflicts with this Court's decisions which relieve the judiciary of that burden and shift the determination to the arbitration tribunals voluntarily selected by the parties.

In *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), a party to an arbitration clause sought to dismiss a suit to compel arbitration on the ground that the plaintiff's "delay in seeking arbitration constituted laches barring enforcement of the contract." The trial court held that a delay of several years in demanding arbitration precluded access to that remedy, and the court of appeals affirmed, concluding that a claim of "dilatory notification of the existence" of an arbitrable dispute was an issue to be decided by the court. This Court reversed the lower court rulings and explained that (406 U.S. at 491–92):

> [O]nce a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement. . . . Having agreed to the broad clause, the company is obliged to submit its laches defense, even if "extrinsic," to the arbitral process.

This Court has repudiated traditional judicial resistance to arbitration and ruled that arbitrators are empowered under federal law to decide preliminary procedural questions "which grow out of the dispute and bear on its final disposition," *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964), as well as other issues extrinsic to the provisions of a con-

tract with an arbitration clause, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (fraud in the inducement). By contrast, the role of courts under the Federal Arbitration Act is strictly limited. In ruling on a motion for a stay of court proceedings, courts may consider "only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co., supra*, 388 U.S. at 404.

Federal courts of appeal have divided over the question whether a court may consider and decide a claim that a party has waived arbitration by delaying its demand, or whether such an issue must be left to the arbitrators.[27] The Second Circuit has taken the position that issues of waiver are for the arbitration panel. *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362, 364 (2d Cir. 1965). Other courts have read this Court's *Flair Builders* decision narrowly, denying that it applies when waiver turns on a party's participation in litigation. *Reid Burton Construction, Inc.* v. *Carpenters District Council*, 535 F.2d 598, 602-603 (10th Cir. 1976); *N & D Fashions, Inc.* v. *DHJ Industries, Inc.*, 548 F.2d 722, 728 (8th Cir. 1977). As a result, there has been considerable uncertainty as to the proper allocation, between courts and federal arbitrators, of defenses such as "laches," "default," "waiver," or "estoppel." A decision giving arbitrators broad authority to resolve such defenses would accord with this Court's prior decisions, would give due recognition to the federal policy favoring arbitration, and would avoid fragmentation of disputes between al-

[27] The New Mexico Supreme Court recognized the existence of this conflict (p. 11a, *infra*).

ready over-burdened courts and the arbitration forums selected by the parties.[28]

5. *Barring arbitration because state antitrust issues were asserted by UNC conflicts with the Federal Arbitration Act.*

The New Mexico Supreme Court's alternative ground of decision was the asserted nonarbitrability of state antitrust issues. This ground raises two vital questions of federal law. One question is whether state antitrust claims are nonarbitrable even though the Federal Arbitration Act broadly upholds arbitration rights set forth in contracts involving interstate commerce and makes no exception for state antitrust issues arising under such contracts. The other question is whether, assuming that state antitrust issues *are* nonarbitrable, the arbitrability of ordinary contract questions which may moot the state antitrust issues is also precluded.

[28] The last proviso in Section 3 of the Federal Arbitration Act, 9 U.S.C. §3, which authorizes a federal court to which a stay application is made to grant a stay only if "the applicant for the stay is not in default in proceeding with such arbitration," was not intended to give courts the power to decide whether arbitration was waived. Section 4, which must be read *in pari materia* with Section 3, does not give a court enforcing an arbitration clause any such power. Section 4 uses the word "default" five times as a term of art—*i.e.*, with reference to a party who refuses totally to comply with an arbitration clause. The concluding proviso of Section 3 was, in this light, designed to prevent a party who refuses to proceed with arbitration—*i.e.*, who is "in default" in the same sense as used in Section 4—from halting litigation on a mere showing that the dispute is subject to arbitration. This was the construction approved by Judge Learned Hand in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir. 1942). See also *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 453-54 (1935) (approving Judge Hand's discussion of this issue, 70 F.2d at 299).

(a) *Arbitrability of state antitrust questions.*—Section 2 of the Federal Arbitration Act declares in broad terms that an arbitration clause in a contract involving interstate commerce is fully enforceable. The New Mexico Supreme Court, however, ruled that there can be no arbitration of state antitrust issues arising under such a contract. It predicated its ruling on cases which have denied arbitrability to *federal* antitrust and securities issues.[29] It is, however, one thing to reconcile conflicting federal statutes by exempting federal antitrust issues from the federal arbitration statute; it is quite another to reconcile conflicting federal and state statutory policies by giving the state policy precedence. The New Mexico Supreme Court has, in effect, held the Federal Arbitration Act to be preempted by the New Mexico Antitrust Act. That raises a constitutional problem under the Supremacy Clause.

Federal courts have uniformly recognized the supremacy of the Federal Arbitration Act when it has conflicted with substantive state policies. For instance, in *Romnes* v. *Bache & Co.*, 439 F.Supp. 833, 839 (W.D. Wis. 1977), which concerned the arbitrability of state securities law claims, the district court held:

> [T]he Federal Arbitration Act creates federal substantive law, and a federal court is not bound to follow state law in interpreting matters arising out of contracts involving interstate commerce, which contracts contain an arbitration clause, nor is it bound to heed state public policy which does not accord with federal policy in this matter.

[29] *E.g., Wilko* v. *Swan*, 346 U.S. 427 (1953); *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

See also, to the same effect, *Collins Radio Co.* v. *Ex-Cell-O Corp.*, 467 F.2d 995, 998 (8th Cir. 1972); *Stokes* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433, 437 (6th Cir. 1975); *Grand Bahama Petroleum Co.* v. *Asiatic Petroleum Corp.*, 550 F.2d 1320, 1326 (2d Cir. 1977).

This Court has itself previously rejected the proposition that state and federal antitrust policies are entitled to like treatment when both must be reconciled with another federal statute. In *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 635–36 (1975), which concerned the question whether an agreement between a union and an employer was subject to federal and state antitrust statutes, this Court said:

> Although we hold that the union's agreement with Connell is subject to the federal antitrust laws, it does not follow that state antitrust law may apply as well. . . . The use of state antitrust law to regulate union activities in aid of organization must also be preempted because it creates a substantial risk of conflict with policies central to federal labor law.

The arbitrability under the Federal Arbitration Act of claims made under state antitrust laws is an important issue that requires resolution by this Court.

(b) *"Intertwinement" of state antitrust issues*—Even if it be assumed, *arguendo,* that state antitrust issues are not arbitrable, it would violate the strong federal policy favoring arbitration to bar arbitration on the basis of a mere assertion of "intertwinement." Application of the "intertwinement" doctrine requires a practical judgment as to whether arbitration of arbitrable issues or litigation of nonarbitrable issues

should proceed first—or whether arbitration and litigation should go forward together. This judgment turns on factors such as the severability of the arbitrable and nonarbitrable claims, the possibility that arbitration of contract issues may totally dispose of nonarbitrable issues, *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977), and the substantiality of the federal antitrust defenses being asserted, *N.V. Maatschappij Voor Industriele Waarden* v. *A. O. Smith Corp.*, 532 F.2d 874, 877 (2d. Cir. 1976). The state courts of New Mexico declined to engage in this practical analysis, choosing instead to rest solely on an abstract and generalized analysis of "intertwinement." They thus ignored the fact that this is, at bottom, a straightforward contract dispute. UNC's antitrust contentions are only some of the issues that have been raised, and others, which are plainly arbitrable, may be dispositive of the dispute.

Those issues may and should be determined by arbitrators before any consideration is given to whether there is merit to UNC's claim under the New Mexico antitrust laws. The federal courts have squarely rejected the proposition "that arbitrable claims become subject to adjudication in court merely because they are related to non-arbitrable claims." *Lee* v. *Ply*Gem Industries, Inc.*, 593 F.2d 1266, 1275 (D.C. Cir. 1979). The decision of the lower courts to the contrary undermines the policy of the Federal Arbitration Act and permits state law to govern in place of the federal statute which the Constitution declares to be supreme.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment of the Supreme Court of New Mexico reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY
Defendant-Appellee.

Appeal From the District Court of Santa Fe County

EDWIN L. FELTER, *District Judge*

OPINION

EASLEY, *Justice.*

Appellee-plaintiff, United Nuclear Corporation (UNC), filed this declaratory judgment action in the Santa Fe County District Court against appellant-defendant, General Atomic Company (GAC), alleging fraud, unlawful monopolistic practices and violation of the antitrust laws, and seeking cancellation of two uranium supply contracts and

damages. GAC denied those allegations, claimed the principal issues are subject to arbitration under the terms of the contract, and counterclaimed against UNC for over one billion dollars in damages.

Indiana and Michigan Electric Company (I & M) and Detroit Edison Company (Detroit), (collectively "the utilities"), were brought into the suit as third-party defendants because they were to be supplied uranium products by GAC from the supplies that UNC had contracted to deliver.

The district court enjoined GAC from proceeding to litigate or arbitrate the same issues in any other jurisdiction. GAC appealed to the U.S. Supreme Court, and that Court reversed.

The trial had been in progress several days when the U.S. Supreme Court mandate came down, but GAC moved to stay the trial until arbitration of the issues could be accomplished. The trial judge denied the motion on the grounds that GAC had waived its right to arbitration. GAC appeals this partial final judgment. We affirm.

The principal issues are:

(1) Whether the Federal Arbitration Act applies.

(2) Whether the issue of waiver of arbitration is for the court or for the arbitrators.

(3) If the determination is to be made by the court, whether the evidence here supports the trial court's finding of waiver.

(4) Whether under the circumstances GAC was constitutionally entitled to further hearing before the district court on the issue of waiver.

Other claims advanced by GAC are that: (5) the trial court's actions were inconsistent with the decision of the U.S. Supreme Court in this case; (6) the holding that the

state's antitrust claims are not arbitrable was in error; (7) the trial court should have stayed or severed the Duke and Commonwealth demands; and, (8) UNC obtained incorrect findings on issues not addressed below.

Factual Background

As we survey the massive accumulation of evidence, which could be measured by the ton, the key inquiry is: What was the intent of GAC? Did it intend to arbitrate, litigate or both? In order to determine this intent, we consider all the material assertions and objective manifestations of GAC, together with all other facts and circumstances. This calls for greater detail in setting forth the facts.

UNC and GAC were parties to two contracts, one dated June 30, 1973 (1973 Supply Agreement) covering approximately twenty-five million pounds of uranium, and one dated June 28, 1974 covering three million pounds of uranium (1974 Concentrates Agreement), under which UNC was to supply uranium to GAC. The 1973 Supply Agreement contained an arbitration clause calling for arbitration of all disputes under the rules of the American Arbitration Association (AAA). These rules provide a simple method of invoking arbitration. The initiating party makes demand, setting forth the nature of the dispute, the amount involved and the remedy sought. This is served on the other party and filed in any regional office of AAA, accompanied by a proper fee. (When GAC ultimately filed its motion for stay, it consisted of two pages, and the demand for arbitration contained three and one-half pages.)

GAC is a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc. On August 8, 1975 UNC first filed suit in the Santa Fe District Court against GAC as well as the individual partners in GAC, Gulf and Scallop, asking for a declaratory judgment and damages and raising all issues arising under the 1973 Supply Agreement.

The cause was removed by the defendants to the U.S. District Court for the District of New Mexico. Gulf and Scallop moved to extend the time to answer the complaint and to object to interrogatories propounded by UNC. As grounds for the motion, movants alleged that more time was necessary to determine whether to seek arbitration.

On October 6, 1975 Gulf filed a motion for additional time, stating that failure to demand arbitration prior to answering the complaint without asserting its right to arbitration might constitute a waiver of Gulf's right to compel arbitration. UNC sought voluntary dismissal of the cause in federal court, *which the defendants opposed;* but, the case was dismissed on December 31, 1975, five months after being filed. Neither GAC, Gulf nor Scallop had demanded arbitration or requested a stay in the proceedings to arbitrate.

On December 31, 1975, the same day the first suit was dismissed, UNC again filed suit, against GAC only, in the District Court of Santa Fe County alleging virtually identical claims and filing identical interrogatories. GAC then filed an affidavit of disqualification against Judge Santiago Campos.

On January 19, 1976 GAC filed a federal interpleader action in the U.S. District Court for the District of New Mexico against UNC, I & M, and Detroit as well as Duke Power Company and Commonwealth Edison Company. Although stating that it was not waiving its right to arbitration, GAC sought the judicial determination of all the rights and obligations of the parties under the 1973 Supply Agreement and other utility agreements. On March 2, 1976 the case was dismissed for lack of subject matter jurisdiction. GAC appealed the dismissal to the Tenth Circuit where it was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co.,* 553 F.2d 53 (10th Cir. 1977).

In February and March 1976 GAC filed motions to dismiss for lack of personal jurisdiction, for additional time

to answer interrogatories, and for dismissal due to the failure to join certain parties. All three motions specified that they were made "without waiving its right to demand arbitration."

In a brief in support of its application to dismiss for lack of jurisdiction, filed on March 22, 1976, the following statement was contained: "At the outset, defendant admits to having filed various legal actions in New Mexico because New Mexico provided the only or best forum for the vindication of its rights in various matters."

In March 1976 UNC moved for a default judgment for a willful failure to answer interrogatories, but later withdrew the application "in consideration of the agreement attached hereto." The agreement specified that GAC was to answer "in good faith all interrogatories to defendant presently pending." The parties stipulated to a number of actions to be taken in the discovery process which would not have been available as a matter of right under arbitration, and which ultimately cost the parties millions of dollars. Nothing was mentioned in the stipulation regarding GAC's asserted right to arbitrate.

On March 15, 1976 UNC applied for an injunction to restrain GAC from *filing suit* against UNC in other jurisdictions concerning the same facts and circumstances. No mention was made of arbitration. On that same date a temporary restraining order was issued for a ten-day period prior to the hearing enjoining GAC from filing suits or third-party complaints against UNC in any other jurisdiction. The restraining order placed no restraints on GAC against demanding arbitration and seeking a stay of the court proceedings during this period of time, which was seven months after the first complaint had been filed. Up to that time, GAC had made no demand for arbitration upon which a challenge to the jurisdiction of the court could be predicated. GAC filed a response and memorandum brief in answer to the motion for a preliminary in-

junction but did not mention the issue of arbitration therein.

The first indication in the record of proceedings that arbitration might be enjoined is a statement by the court at the hearing held on April 2, 1976 on the application for enjoining lawsuits in other forums. The judge referred to a letter written by him, dated March 29, 1976, three days before the hearing, in which he had outlined the terms of the proposed preliminary injunction. One of the terms was to restrain GAC from seeking *arbitration* in any other forum, a remedy not even requested by UNC. The letter was received by GAC attorneys on March 30, 1976. No effort was indicated on the part of GAC to preclude a hearing on restraints against arbitration because of lack of proper notice, and no effort to demand arbitration before the hearing. The preliminary injunction followed closely the statement of terms contained in the letter.

As bearing on GAC's avowed allegiance to arbitration of the issues here, there was a significant colloquy among the attorneys and the judge at the hearing on the motion for preliminary injunction held three days after GAC received the judge's letter. The letter and the form of the preliminary injunction were under discussion. GAC made reference to the clause in the contract providing for arbitration and called specific attention to the New Mexico Uniform Arbitration Act, § 44-7-2(D), N.M.S.A. 1978, which reads as follows:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section . . . .

During those proceedings nothing was mentioned by GAC regarding federal arbitration rights.

GAC's attorney stated further: "We want to make sure and we have admitted language to this effect, that we are

not foreclosed, because obviously the Plaintiff would not be foreclosed from demanding arbitration *in this action.*" (Emphasis added.) GAC further complained that it was unequal treatment to enjoin GAC from participation in arbitration in other actions and not to restrain UNC from doing so. GAC asked that it not be deprived of the right to demand arbitration and suggested that it would be inappropriate to foreclose such remedy.

UNC stipulated that it should be equally enjoined by the preliminary injunction and the court interlined wording in the order to effect this purpose. The following discussion then took place.

MR. THOMPSON:	. . . [W]e believe that we should not be foreclosed, in spite of what the Plaintiff has stated at this point. I have also raised the question of the *possibility* of the Defendants desiring to exercise their rights to arbitration *in this case*, under Article 17 of the Contract, . . . (Emphasis added.)
THE COURT:	Subject to the supervision of this court.
MR. THOMPSON:	*That is correct.* We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration *in this case.* (Emphasis added.)
MR. BIGBEE:	It is clear enough anyway, anything they want to file into this action will be subject to your Honor's decision.

THE COURT: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbitration Clause of the Contract in this forum subject to the jurisdiction of this Court?

MR. BIGBEE: I did not. I understood that it may or may not come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled to do it.

The court, at another point when the language of the preliminary injunction was being discussed, stated:

THE COURT: I don't think there is anything in the language here that relates to arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it that can be clarified.

MR. BIGBEE: There is no question that they have the right to include that, whether it should be granted or what[,] it is, [sic] under Your Honor's jurisdiction. . . .

The preliminary injunction, as issued, restrained GAC from either arbitrating or litigating the same issues "in any other forum." The dispute was brought to this Court, where the trial court was sustained, and then was taken to the United States Supreme Court, which held that the trial court could not properly restrain GAC from seeking relief in federal courts or by arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-14.

GAC filed its answer on May 5, 1976 stating that the answer was "as to all matters in which arbitration is not being sought by defendant and as to all issues which the court may deem unarbitrable." GAC did not raise the issue of arbitration as an affirmative defense, nor did it ask for a stay in the proceedings for the purpose of demanding arbitration or arbitrating the dispute. GAC also counterclaimed, asking the court to enforce the contractual obligations or, in the alternative, for damages in the sum of $1,030,000,000 and costs.

The parties prepared a voluminous pre-trial order which was signed by the court and filed in August 1977 in which there was nothing mentioned at any point about arbitration rights, although GAC prepared its portion of the order. I & M and Detroit were involuntarily joined as defendants at the instance of GAC on some issues different from those asserted against UNC.

The first demand for arbitration came on November 30, 1977 and made its way into the record at page 5455 of the transcript of the record proper at a point where it took over 2,000 additional pages of transcript of proceedings to detail the progress of the suit.

Thereafter, for a total period of over two years, dating from the filing of the first complaint up to the demand for arbitration, the parties were in and out of the district court, the federal courts, and this Court dozens of times on mo-

tions and interlocutory appeals. Most of the activity in the district court concerned discovery proceedings for which the parties obviously expended millions of dollars. GAC claimed to have submitted 6,000,000 pages of material for UNC to inspect and claimed that UNC had actually copied approximately 180,000 pages. GAC alleged that producing the documents and answering interrogatories propounded by UNC had involved on its part the efforts of more than 37 lawyers, 19 paraprofessionals, 80 management personnel and engineers, plus secretarial and clerical personnel. The total hours allegedly consumed by April 19, 1977 was estimated to be 34,700. Over 100 depositions were taken resulting in 16,000 pages of testimony and 2,785 deposition exhibits. GAC contended that the parties had designated approximately 11,000 exhibits. UNC claimed that GAC had copied 500,000 pages of its records.

1. *Applicability of The Federal Arbitration Act*

Although there was considerable controversy at trial over whether the state or federal statutes govern the arbitration rights of the parties, the trial court concluded that it had jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 1-14. The parties now agree with this judgment, as do we.

GAC insisted below that the federal act applies while UNC was contending that the New Mexico Uniform Arbitration Act governs. Sections 44-7-1 to 22, N.M.S.A. 1978. The trial court first held with UNC, but in the decision being appealed, concluded that jurisdiction was present under both acts. GAC complains that the record does not show that the court decided the issue based on the federal act, although concluding that it applied. We cannot go behind a valid conclusion to invalidate it by showing that the judge reached it for the wrong reasons.

Tsosie v. *Foundation Reserve Insurance Company*, 77 N.M. 671, 427 P.2d 29 (1967); *Holmes* v. *Faycus*, 85 N.M. 740, 516 P.2d 1123 (Ct.App. 1973).

The federal act provides, in § 3, that when a proceeding is brought in court involving any issue referrable to arbitration, the court "shall on application of one of the parties stay the trial until such arbitration has been had . . . providing the applicant for the stay of the action is not in default in proceeding with such arbitration." The statute does not specifically mandate that a demand for arbitration must be made before application is made to the court for a stay. UNC claims that GAC is in "default" under the terms of this statute and has therefore waived its right to seek arbitration.

2. *Forum for Question of Waiver*

GAC insists that the arbitration board and not the court should decide whether GAC has waived its rights to arbitration. Although GAC relies on authority to the contrary,[1] at least a strong majority of courts take jurisdiction over the issue with many finding that waiver has occurred. *Demsey & Associates* v. *S.S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972); *Burton-Dixie Corp.* v. *Timothy McCarthy Const. Co.*, 436 F.2d 405 (5th Cir. 1971); *Cornell & Company* v. *Barber & Ross Company*, 360 F.2d 512 (D.C. Cir.

[1] *Hanes Corp.* v. *Millard*, 531 F.2d 585 (D. C. Cir. 1976); *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965); *Lundell* v. *Massey-Ferguson Services N.V.*, 277 F. Supp. 940 (N.D. Iowa 1967); *Auxiliary Power Corporation* v. *Eckhardt & Co.*, 266 F. Supp. 1020 (S.D.N.Y. 1966); *Lowry & Co.* v. *S.S. Le Moyne D'Iberville*, 253 F. Supp. 396 (S.D.N.Y. 1966), *appeal dismissed*, 372 F.2d 123 (2d Cir. 1967).

1966); *American Locomotive Co.* v. *Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950).[2]

The Federal Arbitration Act, 9 U.S.C. § 3, clearly mandates that a court in which a case is pending, and a stay is requested for arbitration, has jurisdiction to determine whether the movant is "in default in proceeding with such arbitration. " Our case was in this precise posture. We hold that the judge was not in error in assuming jurisdiction to decide the question of waiver.

3. *Question of Waiver*

Although there is disagreement from case to case as to what set of facts will justify a holding that a party has waived his rights to arbitration, the federal courts have developed general principles that are useful in appraising this issue. It has been held that the Federal Arbitration Act evidences a strong federal policy favoring the enforcement of arbitration agreements. *Hanes, supra; Demsey,*

[2] Other courts that have decided the issue of waiver and found that rights have been lost are: Circuit Courts: *E. C. Ernst, Inc.* v. *Manhattan Const. Co. of Tex.*, 559 F.2d 268 (5th Cir. 1977; on rehearing); *Gutor International AG* v. *Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *E. I. Du Pont De Nemours & Co.* v. *Lyles & Lang Const. Co.*, 219 F.2d 328 (4th Cir. 1955), *cert. denied*, 349 U.S. 956 (1955); *American Locomotive Co.* v. *Chemical Research Corp.*, 171 F.2d 115 (6th Cir. 1948), *cert. denied*, 336 U.S. 909 (1949); *Galion Iron Works & Mfg. Co.* v. *J. D. Adams Mfg. Co.*, 128 F.2d 411 (7th Cir. 1942). District Courts: *Weight Watch. of Quebec Ltd.* v. *Weight W. Int., Inc.*, 398 F. Supp. 1057 (E.D.N.Y. 1975); *Liggett & Myers Incorporated* v. *Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Sulphur Export Corporation* v. *Carribean Clipper Lines, Inc.*, 277 F. Supp. 632 (E.D. La. 1968); *United Nations Children's Fund* v. *S/S Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1966). *See also N&D Fashions, Inc.* v. *DHJ Industries Inc.*, 548 F.2d 722 (8th Cir. 1977); *Gulf Central Pipeline Co.* v. *Motor Vessel Lake Placid*, 315 F. Supp. 974 (E.D. La. 1970).

supra; Carcich v. *Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1968). The reasons for the encouragement of arbitration are to ease the congestion in the court systems, to speed up the resolution of disputes, and to afford a more economical means of disposing of cases. *Griffin* v. *Semperit of America Inc.*, 414 F. Supp. 1384 (S.D. Tex. 1976). *See also Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976).

As is true in other types of contracts, a party may waive certain terms, but in arbitration agreements the courts hold that all doubts as to whether there is a waiver must be resolved in favor of arbitration. *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed per stipulation*, 364 U.S. 801 (1960); *Bigge Crane and Rigging Co.* v. *Docutel Corporation*, 371 F. Supp. 240 (E.D.N.Y. 1973).

The party asserting the default in pursuing arbitration bears a heavy burden of proving waiver. *General Guar. Ins. Co.* v. *New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970); *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (1st Cir. 1968).

The courts generally hold that dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver. *Demsey, supra; Carcich, supra.* Waiver cannot be inferred merely from a party's attempt to meet all issues raised between it and another party. *Germany* v. *River Terminal Railway Company*, 477 F.2d 546 (6th Cir. 1973); *Romnes* v. *Bache & Co., Inc.*, 439 F. Supp. 833 (W.D. Wis. 1977). "'[D]efault' under the [Federal Arbitration Act] may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party." *Batson Y. & F. M. GR., Inc.* v. *Saurer-Allma GmbH-Allgauer M.*, 311 F. Supp. 68, 73 (S.C. 1970).

It must appear that the delay in requesting arbitration was an intentional relinquishment of the right to arbitrate. Such intention may be inferred when a party takes action inconsistent with its right to demand arbitration. *Weight Watchers, supra. See Cornell, supra; The Belize,* 25 F. Supp. 663 (S.D.N.Y. 1938). It is the objective manifestation of intent upon which the opposing party may rely. The question should be determined by the trier of facts based on the evidence in each case. *Burton-Dixie, supra; Weight Watchers, supra.* An appellate court should accept such factual determination if supported by substantial evidence. *Burton-Dixie, supra; Galion Iron Works, supra.*

In *Cornell, supra,* the trial court denied a stay under 9 U.S.C. § 3, because the party was "in default in proceeding with such arbitration," and stated:

> A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right. Once having waived the right to arbitrate, the party is necessarily "in default in proceeding with such arbitration."
>
> Before filing the present motion, appellant (1) moved for a transfer of venue to the Eastern District of Pennsylvania, (2) filed an answer to appellee's complaint and a counterclaim, and (3) filed notice of depositions, took the deposition of an official of appellee, and procured the production of various records and documents. As the District Court stated:
>
> > [T]he litigation machinery had been substantially invoked and the parties were well into the preparation of a lawsuit by the time (some four months after the complaint was filed) an intention to arbitrate was communicated by the defendant to the plaintiff.

360 F.2d at 513. (Footnotes omitted.)

In *Weight Watchers, supra,* the court made a determination as to the elements of waiver in these cases, stating:

> The factors upon which the waiver question appears to have turned most frequently against the party seeking to compel arbitration are his dilatory conduct in seeking arbitration, usually coupled with his gaining of an undue advantage in the judicial forum or other substantial prejudice to the opposing party, or any other actions taken by the moving party which are sufficiently inconsistent with his seeking arbitration. Examining the circumstances of a particular case, it is usually the absence of one or more of these factors that forms the basis for concluding there has been no waiver.

398 F. Supp. at 1059. (Footnotes omitted.)

As a basis for holding that waiver had been correctly determined, the court in *Burton-Dixie, supra,* stated the evidence to be as follows:

> [A]t no time before answering the complaint in the instant lawsuit did McCarthy demand that the matter be submitted to the architect or to arbitration. Even when Burton-Dixie filed suit against McCarthy, McCarthy did not attempt to invoke the arbitration provision in the contract. In its answer to the complaint, McCarthy did not ask the court to stay proceedings pending arbitration, but rather denied liability and set up as an affirmative defense Burton-Dixie's failure to arbitrate. Moreover, McCarthy impleaded as third-party defendants two of its subcontractors and proceeded to litigate the dispute over the defective roof.

436 F.2d at 408-409. The court concluded that McCarthy waived its right to insist upon arbitration.

The United States Court of Appeals in *Demsey, supra*, after analyzing numerous cases which hold that there was no waiver under the particular facts, stated:

> We have found no cases, however, where arbitration has been allowed after a party has answered on the merits, asserted a cross-claim that was answered, participated in discovery, failed to move for a stay, and gone to trial on the merits.
>
> We can think of no clearer case of prejudice than we have here in this case. The substantial expense to all concerned that was involved in the trial of all the factual and legal issues in the case, including those raised by Jordan's cross-claims, was caused by Jordan's full participation in the pretrial procedures and in the trial on the merits, despite its mere allegation of the arbitration clause in the voyage charter as a defense. We think it would be a gross miscarriage of justice now to require a retrial by arbitration of any of these issues.

461 F.2d at 1018.

In *Gavlik Const. Co.* v. *H. F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975), the court stated: "Recent cases have only found waiver where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." (Citing *Demsey, supra; American Locomotive* v. *Gyro, supra; Ernst, supra; Liggett, supra;* and *Sulphur Export, supra.*)

Failing to invoke arbitration for ten months from the date the suit was commenced, while at the same time obtaining many benefits from pre-trial discovery that would not have been available had they reasonably demanded arbitration, was held to constitute waiver of the arbitration provision in *Liggett, supra.* The parties demanding arbitration had answered and counterclaimed without asserting their right to arbitration, but they had actively

participated in the discovery process and obtained a number of extensions. The court held that their acts and conduct had been prejudicial and thus constituted waiver.

In *E. C. Ernst, supra,* the court found waiver, stating:

> When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial, which in this case was quite lengthy. Arbitration is designed to avoid this very expense. Substantially invoking the litigation machinery qualifies as the kind of prejudice to Manhattan that is the essence of waiver. (Citations omitted.)

559 F.2d at 269.

A party to a lawsuit who claims the right to arbitration must take some action to enforce that right. *Burton-Dixie, supra.* This must be done within a reasonable time after suit is filed. *Demsey, supra; American Locomotive* v. *Gyro, supra.*

The courts have held a variety of acts to be inconsistent with a party's alleged reliance on arbitrating the dispute in question. The determination of waiver seldom turns on a single inconsistent act or failure to act. Some of the conduct or acts of a party in relationship to a claim subject to arbitration that have been considered by themselves, or in conjunction with others, to constitute default or waiver are as follows: Answering a complaint, *Demsey, supra; Cornell, supra; Weight Watchers, supra; Liggett, supra;* counterclaiming in a judicial proceeding, *Demsey, supra; Cornell, supra; American Locomotive* v. *Gyro, supra; Liggett, supra;* filing a complaint, *Gutor International, supra; Bank of Madison* v. *Graber,* 158 F.2d 137 (7th Cir. 1946); *Galion Iron Works, supra;* participating in a discovery process in a lawsuit, *Demsey, supra; Cornell, supra; Liggett, supra;* moving for summary judgment, *Weight Watchers, supra;* going to trial on the merits, *Demsey,*

supra; Blake Construction Company v. *United States*, 252 F.2d 658 (5th Cir. 1958); *Radiator Speciality Co.* v. *Cannon Mills*, 97 F.2d 318 (4th Cir. 1938).

Preparation for trial by a party based on the belief that the other party does not desire or intend to make a demand for arbitration has been held to constitute substantial prejudice which may invoke a waiver or constitute a default under the Federal Arbitration Act. *Demsey, supra; Weight Watchers, supra.*

The courts also consider any advantage that may have been received by a party that might not otherwise have been available to the party under an arbitration proceeding by reason of participating in the discovery process. *Liggett, supra.* Neither the federal statutes nor the rules of AAA give a party an absolute right to demand discovery. As a general rule, discovery is very limited in arbitration proceedings. Once a district court has stayed judicial proceedings pending arbitration, the parties may not continue discovery in the district court. *Mississippi Power Company* v. *Peabody Coal Company*, 69 F.R.D. 558 (S.D. Miss. 1976); *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957); *Cavanaugh* v. *McDonnell & Company*, 357 Mass. 452, 258 N.E. 2d 561 (1970). In *Bigge, supra*, a federal district court did enforce discovery which had been ordered by the arbitrator, but did so on a showing of necessity rather than of mere convenience. Later cases have denied discovery, but, based on *Bigge, supra*, have indicated that discovery might be proper in extraordinary circumstances. *Coastal States Trading, Inc.* v. *Zenith Nav. S.A.*, 446 F. Supp. 330 (S.D.N.Y. 1977); *Levin* v. *Ripple Twist Mills, Inc.*, 416 F. Supp. 876 (E.D. Pa. 1976).

Discovery procedures are often the most expensive and time-consuming elements of a court trial, and thus have often been considered to be inconsistent with the reasons for arbitration. *Commercial Solvents, supra.* In most cases, discovery in arbitration is limited to the discovery available under the Arbitration Act itself. M. Domke, The Law and Practice of Commercial Arbitration, § 27.01 (1968); G. Goldberg, A Lawyer's Guide to Commercial Arbitration, § 3.03 (1977). The only discovery mentioned in the Act is the taking of depositions of witnesses who cannot be subpoenaed or who are unable to attend the hearing.

No one act or a specific series of acts has been held consistently to indicate waiver. The courts have looked to the totality of the proof in each case to arrive at a decision. We take into consideration all of the material facts to determine whether GAC defaulted on its obligation to make a timely demand for arbitration and a stay of proceedings and thus waived its rights.

We ask whether GAC intended to arbitrate or litigate. However, it would be a mistake to assume that each of these courses is mutually exclusive of the other. We must inquire whether it can be inferred from the circumstances that the intent of GAC was to litigate *and* arbitrate. The purpose could plausibly be to preserve the right to arbitrate and at the same time litigate down to the last possible moment. Thus, we examine not only the acts of GAC that occurred prior to the time the injunction was entered on April 2, 1976 but the conduct or inaction of GAC thereafter as bearing on the real designs of the company.

It is hornbook law that intent is a state of mind. As such, it generally remains hidden within the brain where it was conceived. It is rarely, if ever, susceptible of proof by direct evidence. It must be inferred from the words, acts or conduct of the party entertaining it as well as the other attendant facts and circumstances. No citations as to these principles are necessary.

In applying the above law to the facts in this case we consider the challenges specified by GAC. As to waiver, GAC challenged six of the district court's findings of fact

that: (a) the preliminary injunction did not prohibit GAC from demanding arbitration in the district court; (b) for twenty-seven months GAC did not "in any way manifest its intention or desire to arbitrate rather than litigate"; (c) GAC made numerous motions for extensions and discovery orders and "represented to the district court that such orders were necessary for its preparation for trial"; (d) information obtained from UNC by GAC by way of discovery would not otherwise have been available to it; (e) UNC had been prejudiced and would be irreparably injured if a stay were ordered; and (f) GAC was in default and had relinquished any rights to arbitrate.

(a) The extent to which GAC was *prohibited*, if at all, by the injunction from making demand for arbitration and from requesting a stay of the proceedings in the district court is a very crucial matter with GAC. That company contends that the injunction absolutely prohibited it from demanding arbitration outside New Mexico and that arbitration within New Mexico was ordered to be conducted only under the supervision of the district court. GAC argues that this was such a violation of its rights that it had no duty to pursue the matter further in the trial court. GAC claims that its actions after the issuance of the injunction were strictly in self-defense and were forced upon it by the illegally obtained injunction.

It is further claimed by GAC that its actions prior to the issuance of the injunction on April 2, 1976 were not such as would justify a finding of waiver and that most of the conduct of GAC upon which UNC relies for support of its allegation of waiver occurred after GAC was unlawfully restrained from seeking arbitration.

We look at all the evidence. The hearing on April 2, 1976 on the motion for an injunction is most significant. The motion did not contain any plea for restraining arbitration; and the temporary restraining order mentioned only restraints on suing or counterclaiming. The first time that

the record shows notice to GAC that the court was even considering enjoining arbitration demands was in the judge's letter of March 30, three days before the hearing. However, GAC did not object to holding the hearing insofar as it pertained to arbitration, did not demand arbitration in the interim, did not seek to continue the hearing while it took the proper steps to demand arbitration and to request a stay in the suit, and did not raise the issue of its rights under the Federal Arbitration Act at the hearing on the motion.

The reliance of GAC on § 44-7-2 of the New Mexico Uniform Arbitration Act, which provides for an automatic stay of court proceedings pending arbitration on "application therefor", indicates that GAC was fully aware of this simple means of putting an immediate halt to the litigation, yet its lawyers talked only of the "possibility of arbitration". Bearing in mind that the colloquy among lawyers and judge may not ordinarily be considered to dispute the judgment, it is still admissible as being indicative of the intent of GAC, with regard to arbitration as opposed to litigation upon which UNC and the court were entitled to rely. GAC only alerted the court to its right to demand arbitration under the New Mexico Uniform Arbitration Act, where it would be entitled to an automatic stay in the event that it demanded arbitration, and made references only to arbitration "in this case". Thus, another well-known risk was taken by GAC, i.e., that it would not later be permitted to complain because of failing to properly object. N.M.R. Civ. P. 46, N.M.S.A. 1978; N.M.R. Civ. App. 11, N.M.S.A. 1978.

Although the court offered clarification of what was meant by a right to arbitrate "in this forum", none was ever requested at that time or any later time, nor was any effort made to determine what the judge meant when he said that if GAC decided to exercise its rights to arbitration it would be done "subject to the supervision of this court." The latter expression could be interpreted in many

ways, one of which could be that the judge believed that he had the power to refuse to stay the proceedings if the evidence showed a default on GAC's part in demanding arbitration that amounted to a waiver. Another probability is that the court would want to retain jurisdiction over any contested items in the contract that were not subject to arbitration. Furthermore, the court would have the jurisdiction to inquire whether or not there was in fact a valid contract providing for arbitration. No clarification was sought and none was thereafter offered.

There is nothing in the preliminary injunction that prohibited GAC from demanding arbitration at any time by serving a demand on UNC in New Mexico, without regard for the location at which the arbitration would take place. This would have set the stage for a claim by GAC that the court did not have jurisdiction. The argument that GAC could do nothing with regard to arbitration is not persuasive. Nor is the claim that it had to await the decision of the U.S. Supreme Court before it could make any demands for arbitration. The U.S. Supreme Court decision did not change the portion of the preliminary injunction giving GAC the right to demand arbitration in New Mexico.

Common sense dictates that a litigant that has been so capably represented by such a host of outstanding lawyers, who have meticulously handled every other infinitesimal detail, and who have verbally displayed such ferocious passion for arbitration, could have found a way to say: "Judge, we want to arbitrate." There were no restraints on filing a motion in the trial court for leave to arbitrate. Admittedly, it is not called for under the federal law, but the failure of GAC to adopt such a simple and plausible course of action is a commentary on the validity of its claimed intent to arbitrate.

Inherent in GAC's argument is the impermissible presumption that if it had made demand for arbitration the trial court would have acted unlawfully rather than follow

the mandate of the Federal Arbitration Act. We must presume that the court would have done its "supervision" in accordance with that law. The law presumes that rulings of district courts have validity. *Coastal Plains Oil Company* v. *Douglas*, 69 N.M. 68, 364 P.2d 131 (1961); *Carlile* v. *Continental Oil Company*, 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970). *A fortiori*, the law must presume that rulings which district courts may be called upon to make in the future will likewise be valid.

As suggested by GAC, the court's finding that the preliminary injunction did not prohibit GAC from demanding arbitration with UNC "*in this forum*" shows a tinge of legal conclusion. The thrust of GAC's challenge to this finding is more in the nature of a complaint that it was wrong for the court to prohibit arbitration *in other forums*. The U.S. Supreme Court agreed with this theory; however the finding, or the mixed finding and conclusion, is obviously correct because the prohibition did not run against demanding arbitration with UNC in New Mexico. In order to assert any right to arbitration under 9 U.S.C. § 3, it was mandatory that GAC make a demand for arbitration and make application to the Santa Fe County District Court for a stay in these proceedings, at which time the trial court would have been obligated under federal law to determine whether GAC was in default in demanding arbitration. This is exactly what occurred after the U.S. Supreme Court mandate came down.

Early in its appeal, GAC, in discussing the scope of review available to this court, argued that we should not apply the substantial evidence rule. The argument is, since the trial judge reached his findings by the use of documentary evidence, the pleadings and the statements of the attorneys, this Court is in as good a position to determine the facts by preponderance of the evidence as was the trial judge. We think this case is not a good subject for the application of that principle. We hold that *Valdez* v. *Sal-*

azar, 45 N.M. 1, 107 P.2d 862 (1940) is more in point where this Court stated:

> Where all or substantially all of the evidence on a material issue is documentary or by deposition, the Supreme Court will examine and weigh it, and will review the record, giving some weight to the findings of the trial judge on such issue, and *will not disturb the same upon conflicting evidence unless such findings are manifestly wrong or clearly opposed to the evidence.* (Emphasis added.)

Id. at 7, 107 P.2d at 865.

We affirm the trial court's ruling that the preliminary injunction did not prohibit GAC from demanding arbitration in that court.

(b) GAC filed numerous pleadings which stated that it did not intend to waive its rights to arbitration. However, the trial court found that for a period of twenty-seven months GAC did not "in any way manifest its *intention or desire* to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement." (Emphasis added.) GAC's intentions are the number one question in this case. GAC claims that its numerous statements that it did not intend to *waive its right* to demand arbitration was sufficient to establish its intent. UNC urges that an intention to *preserve the right to demand arbitration* is not the same as an intention or desire *to arbitrate.* UNC relies on the other acts and conduct of GAC to prove that a good faith intent to arbitrate was not shown.

The record shows that GAC was fully aware of the perils of dilatory conduct in asserting its arbitration rights. This knowledge surfaced in its first pleading. However, it took obvious risk after obvious risk. It did not assert arbitration as an affirmative defense in its answer, thus taking the chance of having the issue excluded under N.M.R. Civ. P. 8(c) and 12(b), N.M.S.A. 1978, which call for every defense in law or fact to be "asserted." "The failure to plead the arbitration clause as a defense to the lawsuit will be considered a waiver of the party's rights arising under such clause." M. Domke, *supra.* § 19.01, page 181 (1968); *Almacenes Fernandez, S.A.* v. *Golodetz,* 148 F.2d 625 (2d Cir. 1945). Generally the courts have held that failure to plead an affirmative defense results in the waiver of that defense; and it is excluded as an issue. *Radio Corporation of America* v. *Radio Station KYFM, Inc.,* 424 F.2d 14 (10th Cir. 1970).

GAC further imperiled its position by failing to assert arbitration as a defense in the pre-trial order. Parties are expected to disclose at a pre-trial hearing all legal and factual issues which they intend to raise in the lawsuit. N.M.R. Civ. P. 16, N.M.S.A., 1978; *Becker* v. *Hidalgo,* 89 N.M. 627, 556 P.2d 35 (1976); *Harvey* v. *Eimco Corp.,* 33 F.R.D. 360 (E.D. Pa. 1963); *Burton* v. *Weyerhaeuser Timber Co.,* 1 F.R.D. 571 (D. Ore. 1941). The parties are limited to the issues contained in the order and must not introduce issues not so contained at trial. *Fowler* v. *Crown-Zellerbach Corporation,* 163 F.2d 773 (9th Cir. 1947).

Although these two lapses by GAC and others cited are not conclusive of voluntary waiver, they do add to the volume of proof that the court and UNC were misled into believing that GAC intended to litigate the issues and that its intent to arbitrate was not as strong as it now contends.

An attempt to reserve a right inconsistent with that asserted is ineffectual. *The Belize, supra; Commercial Bank* v. *Central Nat. Bank,* 203 S.W. 662 (Mo. App. 1918).

There was no error in the trial court's finding that GAC did not manifest an intention and desire to arbitrate, as opposed to litigating. The finding is based upon substantial evidence. We will not disturb such a finding. *Montoya* v. *Travelers Ins. Co.,* 91 N.M. 667, 579 P.2d 793 (1978).

(c) The court's finding that GAC made repeated representations to the district court that it needed extensions of time and in "all" instances said the purpose was to enable it to "prepare for trial", is challenged on grounds that most of the acts occurred after the issuance of the preliminary injunction and that *every* such action was not accompanied by the alleged representation. However, GAC failed to comply with N.M.R. Civ. App. 9(d), N.M.S.A. 1978, which requires that the substance of all the evidence be stated with proper transcript references. The same is true of GAC's challenges to the court's findings that UNC had provided *all* materials to GAC sought on discovery and that GAC obtained "huge amounts of information from UNC which would not otherwise be available to it." We hold that challenges (c) and (d) fell short of complying with Rule 9(d) and will not be considered. *Perez* v. *Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974); *Galvan* v. *Miller*, 79 N.M. 540, 445 P.2d 961 (1968). However, as to the merits of the two challenges, careful scrutiny of the record discloses insubstantial support for the contentions. Even if error had been committed as to one or both issues, it would not be dispositive of the case.

(e) The court's finding that UNC had been prejudiced by GAC's default in demanding arbitration is attacked on the basis that there was no such prejudice shown by the events prior to the entry of the injunction against arbitration and that, after the entry of that injunction, GAC's conduct could not be considered in determining waiver. This issue is partially resolved by our holding that there is substantial evidence that GAC did not properly manifest its intention or desire to arbitrate during a period of twenty-seven months from the time of the filing of the first lawsuit to a point well into the trial of the second case.

By that time, UNC had spent millions of dollars on discovery proceedings and trial preparation. UNC takes the position that GAC obtained the advantages of discovery that would not have been available to GAC as a matter of right under the Federal Arbitration Act.

GAC argues that the court's findings of prejudice should be categorized as a legal conclusion and that it was not incumbent upon GAC to establish the lack of an evidentiary basis for the finding as required by Rule 9(d). Even though it is for the court to conclude whether there is prejudice, it is clear that a conclusion must be based on findings of fact that have support in the record. The conclusion fails when it is demonstrated that it has no proper support in the facts. Even though the substantiality of the evidence on this point may not be properly before us, we nevertheless hold on the merits that the evidence in the record substantiates a finding that GAC's default in demanding arbitration caused material prejudice to UNC both before and after the preliminary injunction was issued.

(f) The last finding challenged is that GAC was in default and had relinquished any right to arbitrate. This finding overlaps many of the others. This holding must be predicated upon finding substantial evidence from the entire record.

This complex, multi-party, multi-issue litigation was within days of final solution at the trial level when the first *demand* was made for arbitration. This very simple act of stating, in writing: "We want to arbitrate", followed by a motion for a stay of litigation, would have challenged the jurisdiction of the court to proceed. Our search of the record reveals no instance where these words were either written or spoken until November of 1977.

Without reiterating the facts relied upon, we hold that there is substantial evidence to support the court's finding that GAC was in default and thus waived its right to arbitration.

The parties expressly provided that the AAA Rules would govern arbitration under the 1973 Uranium Supply Agreement. GAC claims that waiver is entirely precluded under § 46(a) of these rules which specifies:

> No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

GAC relies upon *People ex rel. Delisi Const. Co., Inc.* v. *Board of Ed.*, 26 Ill. App. 3d 893, 326 N.E. 2d 55 (1975). This case is distinguishable in that it involved a delay by the party seeking arbitration only for a period during which the validity of the contract to arbitrate was being decided, as opposed to trial preparation and trial in our case. Furthermore, the Illinois Court recognized that only arbitrable questions are covered by §46(a) by stating:

> Moreover, the arbitration clause provides that *arbitrable questions* be decided "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . (Emphasis added.)
>
> 326 N.E.2d at 57.

UNC cities M. Domke, *supra*, at 264, to support its contention that Rule 46(a) is designed only to provide that, after arbitration has been commenced, there is no waiver by participation in judicial proceedings *supplementary to* and *in aid of arbitration*. UNC argues that, regardless of the AAA Rule, a party may be in default in demanding arbitration, as specifically mentioned in the Federal Arbitration Act, and therefore, have no arbitrable questions remaining which could be governed by § 46(a). In the latter situation, it is the province of the court to determine whether there has been a default. The parties are precluded from contracting to exclude the court from jurisdiction over this issue. *American Sugar Refining Co.* v. *The Anaconda*, 138 F.2d 765 (5th Cir. 1943), *aff'd*, 322 U.S. 42 (1944); *Ocean Science & Eng., Inc.* v. *International Geomarine Corp.*, 312 F. Supp. 825 (Del. 1970).

4. *Procedural Issues*

GAC argues that the procedures followed by the court below in arriving at a decision were defective in that (a) the court below failed to exercise its independent judicial discretion in entering its findings and conclusions; and (b) the court erred in disposing of GAC's arbitration claim without a trial-type evidentiary hearing.

(a) GAC states that the findings of fact and conclusions of law were adopted entirely from the proposed findings and conclusions submitted by UNC. GAC argues that this procedure was in violation of N.M.R. Civ. P. 52(B)(a)(5) and (7), N.M.S.A. 1978, and also in violation of the leading case law.

In reviewing the cases cited by GAC it appears that the practice of adopting findings and conclusions entirely as submitted by one of the parties has been held to be error in only the most extreme circumstances. *See Mora* v. *Martinez*, 80 N.M. 88, 451 P.2d 992 (1969); *Chicopee Manufacturing Corp.* v. *Kendall Company*, 288 F. 2d 719 (4th Cir. 1961), *cert. denied*, 368 U.S. 825 (1961). Most of the cases hold that, although the practice is not to be commended, it is not reversible error so long as the finding adopted are supported by the record. *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1964); *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Bradley* v. *Maryland Casualty Company*, 382 F.2d 415 (8th Cir. 1967). The prodigious record in this case provides ample support for the court's findings.

The court entered an order expressly refusing all requested findings and conclusions inconsistent with those announced in its decision. GAC urges that there was a failure to strictly comply with Rule 52(B)(a)(5) since the judge did not mark GAC's requested findings and conclu-

sions "refused". We find no prejudice and thus no reversible error. *Martinez* v. *Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1966), *rev'd on other grounds*, 86 N.M. 151, 520 P.2d 1096 (1974).

As to Rule 52(B)(a)(7), GAC argues that the court adopted the findings and conclusions offered by UNC and, by separate order, refused GAC's "inconsistent" findings and conclusions. The gist of this argument is that this violates the single document requirement of the rule. However, the word "decision" as used in Rule 52 means "findings of fact and conclusions of law." *Trujillo* v. *Tanuz*, 85 N.M. 35, 38, 508 P.2d 1332, 1335 (Ct.App. 1973). Rule 52 contains no requirement that an order *refusing* proposed findings be included in the same document as the court's decision.

(b) GAC's motion for a stay requested a hearing. The trial court gave the parties short notice to submit affidavits and briefs on the facts and the law, but did not hear oral argument or testimony. GAC did not object at the trial level to the sufficiency of the hearing, did not complain that it was being deprived of due process, and did not tender any additional evidence in support of the motion. This issue is raised for the first time on appeal. GAC now argues that it was entitled to a trail-type hearing, claiming that the Federal Arbitration Act and the constitutional due process clauses require such a hearing. The question, however, is what type of hearing is "appropriate to the nature of the case." *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). We must look to the Federal Arbitration Act and the cases interpreting it.

Section 3 of the Federal Arbitration Act provides for a stay of pending court action on application of one of the parties when the trial court is satisfied that the issue involved is referrable to arbitration and that the applicant for the stay of court proceedings is not in default in proceeding with such arbitration. Section 4 of the Act, on the other hand, contemplates a situation where no court action

is pending. It allows for a party to petition any *United States District Court* for an order to compel arbitration, and provides for jury trial. *Prima Paint* v. *Flood & Conklin*, 388 U.S. 395 (1967) held that, under either section, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In that case, the Court said nothing regarding the procedures to be followed in deciding those limited issues.

Section 6 of the Federal Arbitration Act states: "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." Section 4 is the only exception to § 6. *World Brilliance, supra.*

Section 4 provides: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed . . . ." By its literal language, § 4 is applicable only to United States District Courts. *See Robert Lawrence*, 271 F.2d at 407. We have found no authority which indicates that a party may petition a state court for an order to compel arbitration under § 4 of the Federal Arbitration Act. We therefore conclude that § 4 is not applicable to this case.

Except for claims brought pursuant to § 4 of the federal act, claims under that act are to be heard as motions rather than by trail. *World Brilliance, supra.* "Motions may be decided wholly on the papers, and usually are, rather than after oral examination and cross-examination of witnesses." *Id.* 342 F.2d at 366. Contrary to the arguments of GAC, *Prima Paint, supra*, does not change the import of the decision in *World Brilliance.*

GAC claims that the failure to accord it a hearing was a violation of its due process rights. The requirements of

due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). The circumstances of the case dictate the requirements. *Rivera-Lopez* v. *Gonzalez-Chapel*, 430 F. Supp. 704 (D. Puerto Rico 1975). The integrity of the fact-finding process and the basic fairness of the decision are the principal considerations. *Boykins* v. *Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Oral argument on a motion is not a due process right. *Spark* v. *Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975); *Skolnick* v. *Spolar*, 317 F.2d 857 (7th Cir. 1963), *cert. denied*, 375 U.S. 904 (1963).

In our case, the trail judge was ending the second month of the trial on the merits, and had virtually lived with the participants in this controversy for over two years at the time the ruling complained of was made. The record was approaching the 10,000 page point, and exhibits were running into the hundreds of thousands of pages and were being measured by the running foot.

The parties had full opportunity to brief the facts and the law, and they filed extensive briefs with the court before this decision. Both sides filed requested findings of fact and conclusions of law.

Although UNC claims that GAC waived its right to a hearing by failing to properly object and alert the court to the right, if it had such right, we do not decide the issue of waiver. We hold instead that the hearing held by the court was "appropriate to the nature of the case". *Mullane, supra; World Brilliance, supra;* 9 U.S.C. § 6.

5. *Inconsistency of Proceedings.*

GAC claims that the actions of the trial court were inconsistent with the holdings of the U.S. Supreme Court in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977). This bears on the district court's determination not to stay the

trial on the grounds that GAC had waived its right to arbitrate and that the New Mexico antitrust claims were not arbitrable as a matter of law.

In *General Atomic*, the Supreme Court ruled that, "it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts." 434 U.S. at 12. The district court then modified its April 2, 1976, injunction to exclude from its terms and conditions all *in personam* actions in federal courts "and all other matters mandated to be excluded from the operation of said preliminary injunction by the Opinion of the United States Supreme Court, dated October 31, 1977."

The district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings. When GAC sought a stay the trial court had the obligation to determine whether the issues involved in the suit were referrable to arbitration under the agreements, and whether "the applicant for the stay is not in default in proceeding with such arbitration. . . ." 9 U.S.C. § 3. The trial judge made these determinations in favor of UNC. There is nothing in the Supreme Court's decision that prohibits this type of disposition since it comports with the federal statutes.

There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding with arbitration without an order from Judge Felter. 9 U.S.C. § 3.

Furthermore, in *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), decided after argument in this case, the Court observed: "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had

waived any right to arbitrate. Nor did our prior decision prevent the Santa Fe court . . . from declining to stay its own trial."

6. *Arbitration of State Antitrust Laws*

The trial court held that claims raised under the New Mexico Antitrust Act, 57-1-1 to 6, N.M.S.A. 1978, were not arbitrable and that other claims in the suit were so intertwined with the antitrust claims, that none were arbitrable. Although we consider that our decision that GAC has waived its arbitration rights is controlling, in the interest of judicial economy, we decide the antitrust questions.

Even though the Federal Arbitration Act contemplates that *all* claims are arbitrable where there is a contract to arbitrate, the federal courts have established an exception where the federal antitrust laws are concerned. In reconciling two strong and conflicting federal policies, the federal courts have established the rule that claims under the Federal Antitrust Act are not arbitrable under the Federal Arbitration Act. *Applied Digital Tech., Inc.* v. *Continental Gas. Co.*, 576 F.2d 116 (7th Cir. 1978); *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). The New York courts have held that claims arising under that state's antitrust act were not arbitrable under the New York Arbitration Act. *Schachter* v. *Lester Witte & Co.*, 52 A.D.2d 121, 383 N.Y.S.2d 316 (1976), *aff'd on other grounds*, 396 N.Y.S.2d 175, 364 N.E.2d 840 (1977); *Aimcee Wholesale Corp.* v. *Tomar Products, Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223 (1968). We found no case on the issue of whether state antitrust claims are arbitrable under the Federal Arbitration Act. The parties cited none.

GAC argues that, by virtue of the supremacy clause of the United States Constitution, state antitrust claims cannot be applied to bar arbitration under the Federal Arbitration Act. We do not agree.

The policies underlying both federal and state antitrust laws are concurrent, as indicated by the legislative history of the federal act. During the debates on the federal legislation, Senator Sherman commented:

> Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set aside such combinations . . . .

21 CONG. REC. 2456 (1890).

Senator Sherman further stated that the act was designed to "arm the Federal courts . . . that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . ." and that the Act was "in this way to supplement the enforcement of the established rules of common and statute law by the courts of the several States." 21 CONG. REC. 2457 (1890).

Twenty-one states had constitutional or statutory antitrust laws when the Sherman Antitrust Act was passed on July 2, 1890. 26 Stat. 209. 15 U.S.C. § 1 *et seq.* Very shortly thereafter in 1891, the Territorial Legislature of New Mexico passed an antitrust act in which the pertinent and material language is almost identical with the federal law. Chapter 10, § 1 *et seq.*, page 28, *Acts of the Legislative Assembly of the Territory of New Mexico*, 1891. The New Mexico Constitution in Article IV, § 38, later provided that the Legislature "shall enact laws to prevent trusts, monopolies and combinations in restraint of trade."

To further emphasize the common purpose underlying antitrust enforcement and the cooperation between federal

and state authorities, we note that as late as the 95th Congress $11 million in federal grants were made available to aid the states in improving antitrust enforcement. Pub.L. 95-86. *See* S. Rep. No. 95-285 to accompany H. R. 7556, 95th Cong., 1st Sess. 18 (1977).

The underlying purposes behind both the federal and state Laws are the same, to establish a "public policy of first magnitude"; that is, promoting the national interest in a competitive economy. *American Safety Equipment, supra.* We perceive no "clash of competing fundamental policies" between the two statutes as GAC claims. We are convinced by the basic policy considerations expressed in the federal and New York cases holding that antitrust issues are not arbitrable. *American Safety Equipment, supra; Aimcee, supra.* The cases have developed a body of law that is supportive of an integrated federal-state policy mandating that our courts not abdicate their control over antitrust policy. *Aimcee, supra.*

The rationale for this principle is well-stated in *American Safety Equipment, supra.* The court reasoned that a claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy. The plaintiff is likened to a private attorney-general who protects the public's interest. Violations can affect hundreds of thousands—perhaps millions—and inflict staggering economic damage. "We do not believe that Congress intended such claims to be resolved elsewhere than in the courts." 391 F.2d at 827. The court thought it proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. "Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest." *Id.* at 827. It would surely not be a way of assuring the customer that objective and sympathetic

consideration would be given to his claim. The court stated:

> We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear.

Id. at 827-28.

The validity of these reasons does not vanish simply by exchanging the federal judge for one in a state court who is charged with the same responsibility to enforce a strong public policy against monopolistic practices.

"It is now cardinal doctrine that the public interest in the enforcement of antitrust laws makes antitrust claims inappropriate subjects for arbitration." *Hunt* v. *Mobil Oil Corporation,* 410 F. Supp. 10, 25 (S.D.N.Y., 1976), *cert. denied,* 434 U.S. 984 (1977). This strong language leaves no room for argument that, if you swap a large judge for a small one, public interest disappears.

The New York Court of Appeals in *Aimcee, supra,* held that the enforcement of the state's antitrust policy was of such extreme importance to all of its people that commercial arbitration was not a fit instrument for the determination of these controversies. The court reasoned that arbitrators are not bound by rules of law, and their decisions are essentially final. The awards may not be set aside for misapplication of the law. Records need not be kept upon which a review of the merits may be had. Arbitrators are not obliged to give reasons for their rulings or awards. The courts may be called upon to enforce arbitration awards which are directly at variance with the statutory law and the public policy as determined by the decisions of the court. *See generally Applied Digital, supra; Cobb, supra; Power Replacements, supra; American Safety Equipment, supra; Aimcee, supra;* and *Annot.,* 3 A.L.R. Fed. 918, § 2 (1970).

GAC cites several cases which hold that, in enacting the Federal Arbitration Act, Congress created federal substantive law which controls over inconsistent state substantive law. *E.g. Grand Bahama Petroleum Co.* v. *Asiatic Petroleum*, 550 F.2d 1320 (2d Cir. 1977); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976); *Stokes* v. *Merrill Lynch, Pierce, Fenner & Smith*, 523 F.2d 433 (6th Cir. 1975); *Lawn* v. *Franklin*, 328 F. Supp. 791 (S.D.N.Y. 1971). In each of the cases cited by GAC, however, the Federal Arbitration Act was held to control over various *conflicting* state laws, other than state antitrust statutes.

We hold that the enforcement of state antitrust law by the courts rather than by arbitrators is entirely consistent with congressional intent because (1) the state and federal antitrust acts serve to protect the same societal interests, and (2) the Federal Arbitration Act itself provides that arbitration agreements in contracts involving commerce are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract " 9 U.S.C. § 2.

Title 9 U.S.C. § 2 has been construed by several courts. *Litton FCS, Inc.* v. *Pennsylvania Turnpike Commission*, 376 F.Supp. 579 (E.D. Pa. 1974), *aff'd by order*, 511 F.2d 1394 (3d Cir. 1975), turned on whether a state agency had authority to enter into the particular contract. The District Court held that before a state may limit conditions under which a public instrumentality, otherwise possessing the power to arbitrate, may contract to arbitrate, it must do so in a clear and express manner. The court found that the provisons of the Pennsylvania Arbitration Act did constitute an express limitation on the authority of the Turnpike Commission to contract in a manner contrary to such act. The court then held that the Federal Arbitration Act provided for the incorporation of state law governing enforceability of contracts. It is only when a state law contravenes

express provisions of the federal act that the state law must fail. If state law prohibits a public instrumentality from agreeing to arbitrate in a certain manner, the defense that the agency acted ultra vires, in agreeing to arbitrate in that manner, was available to the agency under the Federal Arbitration Act *"if such a defense would constitute 'grounds as exist at law or in equity for the revocation of any contract.'* " (Emphasis added; citation omitted). *Id.* at 587.

In *American Airlines, Inc.* v. *Louisville & Jefferson C. A. B.*, 269 F.2d 811 (6th Cir. 1959), the court reviewed the congressional intent behind the Federal Arbitration Act and stated with reference to arbitration agreements:

> [T]here appears no indication whatever of congressional intent that such agreements would be made valid, irrevocable and enforceable solely by virtue of the Federal arbitration statute.
>
> [T]he Federal Arbitration Statute was intended to declare no more than that agreements to arbitrate "involving commerce" . . . are by virtue of the Federal arbitration statute valid and enforceable, *unless by other Federal law or by State law such agreements are for other reasons to be held invalid or revocable or unenforceable.* (Emphasis added.)

Id. at 816.

The Federal Arbitration Act clearly does not require enforcement of arbitration agreements contained in contracts which are themselves void by operation of a state law which applies to contracts generally. *See Collins Radio Company* v. *Ex-Cell-O Corporation*, 467 F.2d 995 (8th Cir. 1972). Section 57-1-3, N.M.S.A. 1978, provides:

> All contracts and agreements in violation of the foregoing two sections [which prohibit monopolies and restraints of trade] shall be *void*. . . .

Since the federal and state antitrust laws protect the same interests of society, we do not perceive that Congress intended, by enacting the Federal Arbitration Act, to require arbitration under the terms of a contract which is challenged as being in violation of the state antitrust laws. Because of the policy reasons mentioned above, we deem that issues raised under the state antitrust act are not arbitrable.

GAC argues that several issues are unrelated to the antitrust claim and are severable. They argue that the court erred in not allowing arbitration of these other issues.

Whether all issues in the case were so intertwined with antitrust issues as to prohibit arbitration was a question which was answered in the affirmative in *Hunt, supra.* Citing *American Safety Equipment, supra,* and *Cobb, supra,* the court in *Hunt* stated the question to be:

> [W]hether the antitrust issues so permeate the entire case that it would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues."

410 F. Supp. at 26.

The standard of review is whether the trial court abused its discretion. *Applied Digital, supra; A. & E. Plastik Pak Co., Inc.* v. *Monsanto Co.,* 396 F.2d 710 (9th Cir. 1968). A review of the record in this case clearly indicates that the issues are "complicated, and the evidence extensive and diverse. . . ." *American Safety Equipment,* 391 F.2d at 827. It would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues." *Cobb,* 488 F.2d at 50. The lower court did not abuse its discretion in holding that all the issues in this case are so interwined with the antitrust issues that no issues are arbitrable.

7. *Arbitration with Duke and Commonwealth*

GAC contends that UNC has a duty to arbitrate jointly with GAC and Duke Power Company as well as Commonwealth Edison Company, two utility firms that were relying on GAC to supply them with uranium obtained from UNC under the 1973 Uranium Supply Agreement. Duke and Commonwealth had separate contracts under which GAC was obligated. However, GAC claimed that UNC's duty was to supply the uranium "in accordance with the terms and conditions" of the utility contracts. GAC urges that the arbitration clauses in the separate Duke and Commonwealth contracts are incorporated into the 1973 Uranium Supply Agreement by reference because of the above quoted language.

UNC argues that Duke and Commonwealth are not parties to this suit, that the rights and obligations as to those two companies as related to UNC cannot be litigated, and that there is nothing in any of the contracts which obligates UNC to arbitrate with GAC with regard to its duties to those two companies.

The trial court found that the Duke and Commonwealth contracts contained no arbitration agreements between GAC and UNC, and concluded that the agreements with the two utilities did not give GAC any right to demand arbitration with UNC.

Since this issue deals solely with GAC's rights to arbitrate with UNC under the terms of the 1973 Uranium Supply Agreement, it is not necessary that we address this issue. GAC has waived whatever arbitration rights it had under the 1973 Uranium Supply Agreement.

8. *Alleged Findings on Issues Not Addressed Below*

GAC complains that the court's finding that *every* extension of time sought by GAC was accompanied by a representation that the extension was needed to prepare for trial is not correct because there is no evidence that

every action was so accompanied. Error is also alleged in the finding by the trial court that UNC had furnished to GAC *all* of the materials to which it was entitled, GAC contending that the evidence indicates that UNC had made inadequate discovery. GAC further complains that there is no evidence in the record to support the finding that the information obtained by GAC in discovery would not otherwise be available to it. It is not shown that there is prejudice to GAC, even if the challenges have merit. We hold that the challenges to these three findings do not constitute material issues that affect the disposition of this case. *Alonso* v. *Hills*, 95 Cal. App.2d 778, 214 P.2d 50 (1950); *Costello* v. *Bowen*, 80 Cal. App.2d 621, 182 P.2d 615 (1947).

It was never intended that the Federal Arbitration Act be used as a means of furthering and extending delays. The policy is to eliminate the delay and expense of extended court proceedings. *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568 (2d Cir. 1968), *Gulf Central Pipeline Co.* v. *Motor Vessel Lake Placid*, 315 F. Supp. 974 (E.D. La. 1970).

This court holds that the critical elements of inconsistent action, unwarranted delay and substantial prejudice are too prevelant in this case to avoid a holding of waiver. Thus, we affirm the decision of the trial court.

IT IS SO ORDERED.

/s/ MACK EASLEY
MACK EASLEY, *Justice*

WE CONCUR:

/s/ DAN SOSA, JR., *Chief Justice*

/s/ H. VERN PAYNE, *Justice*

APPENDIX B

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,

Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., et al.,

Defendants.

Decision of the Court

Defendant, General Atomic Company, having filed a motion to stay these proceedings, with Bigbee, Stephenson, Carpenter and Crout appearing as counsel for plaintiff and Rodey, Dickason, Sloan, Akin & Robb; Montgomery, Andrews & Hannahs; and Howrey & Simon appearing as counsel for defendant; the Court having considered the allegations and proof of the parties, argument of counsel and authorities cited, and being otherwise fully advised, finds generally in favor of plaintiff and against defendant and hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, United Nuclear Corporation (UNC), is a Delaware corporation, and is qualified to do business in New Mexico.

2. Defendant, General Atomic Company (GAC), is a general partnership composed of Gulf Oil Company (Gulf), is a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.

3. On August 8, 1975, an action was filed in the District Court of Santa Fe County, Civil Cause No. 50044, entitled *United Nuclear Corporation* v. *General Atomic Company, Gulf Oil Corporation and Scallop Nuclear, Inc.*, defendants, which cause was removed to the United States District Court for the District of New Mexico, Civil Cause No. 75-582-B. Included within the scope of the issues raised by the complaint in that cause were all issues arising from the 1973 Supply Agreement.

4. On September 11, 1975, GAC, Gulf and Scallop filed a Motion for Extension of Time in Civil Cause No. 75-528-B requesting additional time within which to answer or otherwise plead to UNC's complaint and to answer or object to UNC's interrogatories. As grounds for their motion, movants stated that the time was necessary to determine whether to seek arbitration of the issues. GAC has known at all material times that it had a right to demand arbitration against UNC.

5. On October 6, 1975, Gulf Oil Corporation filed a Motion for Extension of Time in Civil Cause No. 75-528-B, acknowledging in that motion that failure to demand arbitration prior to answering the complaint or filing such answer without asserting the affirmative defense of compulsory arbitration might constitute a waiver of Movant's right compel arbitration.

6. On December 31, 1975, following its voluntary dismissal of Cause No. 75-528-B in the United States District Court for the District of New Mexico, UNC filed suit against GAC in the District Court of Santa Fe County, Civil Cause No. 50827. Interrogatories were served upon GAC simultaneously with service of the complaint. The

complaint and the interrogatories, both virtually identical to those filed in Cause No. 50044, included within their scope all of the issues arising out of the 1973 Uranium Supply Agreement. GAC disqualified, on the grounds of bias, the Honorable Santiago Campos from presiding in said cause.

7. On January 19, 1976, GAC filed a federal interpleader action in United States District Court for the District of New Mexico, Civil Cause No. 76-092-B, against UNC, Duke Power Company (Duke), Commonwealth Edison Company (Commonwealth), Indiana & Michigan Electric Company (I&M) and Detroit Edison Company (Detroit). GAC's complaint, while stating that it was not waiving its right to arbitration, sought judicial determination of the rights and obligations of all the parties in that cause under the 1973 Supply Agreement and the various utility agreements. That cause was dismissed by order entered on March 2, 1976 for lack of subject matter jurisdiction. GAC appealed and the dismissal was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co., et al.*, 553 F.2d 53 (10th Cir. 1977).

8. No jurisdictional issue in this cause remains. Jurisdiction of the trial court was affirmed by the New Mexico Supreme Court in an appeal brought by GAC. *United Nuclear Corporation* v. *General Atomic Co.*, 560 P.2d 161 (1976).

9. On May 5, 1976, GAC, after having sought and obtained an extension of time within which to answer, filed its answer to UNC's complaint, and a counterclaim against UNC. In its counterclaim, GAC sought judicial determination of the respective rights and obligations of GAC and UNC under the 1973 Uranium Supply Agreement, an order directing specific performance of those obligations and monetary damages, both compensatory and punitive. GAC also alleged that UNC had violated the New Mexico An-

titrust Statutes, § 49-1-1, *et seq.*, N.M.S.A., 1953 and sought over 1 billion dollars in damages for said violation.

10. In its Eighth Defense contained in its Answer, GAC stated that some of the issues in this case are subject to arbitration and that it anticipated becoming involved in arbitration with Duke Power Company (Duke) and Commonwealth Edison Company (Commonwealth), and wanted UNC to be a party to those proceedings. GAC specifically excluded from the scope of its arbitration demand all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement. GAC further stated that to the extent possible, it intended to conduct the arbitration of the issues jointly with the arbitration of the same issues between the respective power companies and itself.

11. On June 4, 1976, UNC filed its Reply to defendant's counterclaim. At that time, all issues related to the 1973 Supply Agreement were before the court on the pleadings of the parties. All of the issues raised are inextricably intertwined with the antitrust allegations raised by both parties.

12. At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

13. On April 2, 1976, the court preliminarily enjoined GAC, its partners, privies, agents, servants and employees, from filing or prosecuting any other action against UNC in any other forum relating to any of the rights,

claims, or the subject matter of this action. The injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities. The preliminary injunction did not prohibit GAC from demanding arbitration with UNC in this forum.

14. Two utilities, Duke and Commonwealth, have demanded arbitration with GAC pursuant to arbitration clauses contained in the Duke and Commonwealth La Salle agreements. These contracts contain no arbitration agreements between GAC and UNC.

15. In December of 1976, GAC moved to join as parties two utilities—I&M and Detroit. I&M consented to joinder and Detroit was joined by order of the Court.

16. Pursuant to its defense against the claims stated by UNC and in attempt to prove the claims stated in its counterclaim, GAC engaged in extensive discovery in this case, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 deposition exhibits. GAC copied more than 500,000 pages of documents produced to it during discovery at UNC's corporate offices from early May until June, 1977. GAC also propounded and received answers to two voluminous sets of interrogatories served on UNC.

17. On August 22, 1977, the Pretrial Order was signed. GAC drafted the portion of the Order which related to its claims against UNC. In this Order, GAC did not state arbitration as a defense to the claims arising under the 1973 Supply Agreement, nor did it indicate an intention or a desire to resolve the disputed issues by arbitration rather than litigation.

18. On September 19, 1977, GAC filed a Motion for Partial Summary Judgment. Pursuant to that motion, GAC sought a judicial determination that the 1973 Supply

Agreement was not procured by fraud or coercion, that the Agreement was not in violation of the New Mexico Antitrust Laws, that UNC had subsequently ratified the 1973 Supply Agreement, and that UNC's performance of the 1973 Supply Agreement is not executed on the grounds of commercial impracticability. On October 27, 1977, the court rendered a judicial determination that the Motion for Summary Judgment was not well taken and the Motion was, therefore, denied.

19. On October 31, 1977, the parties to this cause proceeded with the trial on the merits and said trial has continued for more than a month.

20. In numerous instances, GAC has invoked the appellate jurisdicion of the courts of New Mexico by filing appeals or petitioning for writs of prohibition or superintending control relating to jurisdiction of the trial court, failure to disqualify plaintiff's counsel, entry of the preliminary injunction, failure to join indispensable parties, failure to grant a continuance of the trial and to obtain a modification of the preliminary injunction pursuant to the opinion of the United States Supreme Court.

21. GAC has repeatedly during the course of these proceedings, obtained Orders allowing extensions of time to file motions; to respond to motions; to file memoranda; to compel discovery; to respond to discovery at all times representing to the court that such Orders were necessary for its preparation for trial.

22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings.

23. On November 30, 1977, GAC filed a motion for a stay of all proceedings in this action on the grounds that it had that day demanded arbitration between GAC and

UNC on all issues relating to the validity, enforceability and interpretation of the 1973 Supply Agreement.

24. From the commencement of the original action until the present, UNC has made tremendous expenditures of time, effort and money in the preparation of its case for trial on the merits and in providing to GAC all of the materials which it sought in discovery to which it was entitled under the Rules of Civil Procedure of the State of New Mexico.

25. As a result of its discovery offering undertaken in this judicial proceeding pursuant to the Rules of Civil Procedure of New Mexico, GAC has acquired huge amounts of information from UNC which would not otherwise be available to it.

26. UNC has been prejudiced by GAC's failure to timely demand arbitration and UNC will be irreparably injured if the proceedings in this cause were stayed and arbitration ordered.

27. From the commencement of the original action in August, 1975, until the filing of the present motion, a period of more than 27 months, GAC has, with knowledge of its rights, not demanded, or sought to compel arbitration with UNC. GAC is in default and has voluntarily and intentionally relinquished any rights it may have had to arbitrate with UNC.

28. The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement.

29. The 1974 Uranium Concentrates Agreement contains no arbitration clause.

30. There is no just reason to delay the entry of a partial final judgment herein in accordance with these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to §§22-3-9, *et seq.*, N.M.S.A., 1953 (the Uniform Arbitration Act) or 9 U.S.C. §1 *et seq.* (the Federal Arbitration Act) or both, to determine whether GAC may properly demand arbitration with UNC.

2. GAC has waived any rights to demand arbitration from UNC and has been in default in exercising these purported rights.

3. GAC's motion to stay these proceedings should be denied.

4. GAC has claimed that it is entitled to assert certain rights under the Federal Arbitration Act. This Court's order staying arbitration proceedings shall not in and of itself, operate to preclude GAC from asserting its claimed federal rights in appropriate judicial proceedings. GAC has waived and is in default of all rights it may have had to have its disputes with UNC determined in arbitration.

5. Neither the Duke nor Commonwealth Agreements give GAC any rights to demand arbitration with UNC.

6. The arbitration clause of the 1973 Supply Agreement, if valid, allows only those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement to be submitted to arbitration.

7. The issues arising under the New Mexico Antitrust Laws, § 49-1-1, *et seq.*, N.M.S.A., 1953 may not be submitted to arbitration.

8. All issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration.

9. There is no just reason to delay the entry of a partial final judgment in accordance with these findings of fact and conclusions of law.

10. The arbitration proceedings heretofore filed by GAC against UNC should be stayed.

/s/ EDWIN L. FELTER
District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of
GULF OIL CORPORATION and
SCALLOP NUCLEAR, INC., et al.,
Defendants.

PARTIAL FINAL JUDGMENT

Filed '77 Dec. 27

This matter having come on to be heard before the Court upon defendant General Atomic Company's Motion To Stay Proceedings, the parties having appeared by their respective counsel of record and the Court now being sufficiently advised, and

The Court having thereafter made and entered its findings of fact and conclusions of law in respect to the issues raised by said Motion, and

It further appearing to the Court that pursuant to the provisions of Rule 54 (b) (1) in the New Mexico Rules of Civil Procedures, and the Uniform Arbitration Act, §23-3-9 *et. seq.* N.M.S.A. 1953 (1975 Supp.), and the Federal Arbitration Act, 9 U.S.C. *et. seq.*, there is no just reason for delay in the entry of a partial final judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that General Atomic Company's Motion to Stay Proceedings, be and the same hereby is denied. Provided, however, that this Partial Final Judgment shall not, in an of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.

/s/ Edwin L. Fetter
District Judge

APPENDIX D

Arbitration Clause In The 1973 Supply Agreement

ARTICLE XVII

ARBITRATION

In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.

The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-190

GENERAL ATOMIC COMPANY,
Petitioner,

v.

UNITED NUCLEAR CORPORATION AND
INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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September 5, 1979

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CITATIONS

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OPINIONS BELOW

The opinion of the New Mexico Supreme Court (Pet. App. 1a-42a) is reported. *United Nuclear Corporation v. General Atomic Co.*, __ N.M. __, 597 P.2d 290 (1979). The decision and partial final judgment of the District Court for the First Judicial District, Santa Fe County, New Mexico (Pet. App. 43a-51a) is not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court, affirming the partial final judgment of the District Court (Pet. App. 52a-53a), was entered on May 7, 1979, and the petition was timely filed. This Court's jurisdiction is grounded upon 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether petitioner waived any right to arbitration under the Federal Arbitration Act by inconsistent litigation activities extending over a period of more than two years.

2. Whether petitioner had a right to an evidentiary hearing on the waiver issue under the Federal Arbitration Act or the Due Process Clause of the Fourteenth Amendment, when the issue was decided upon the basis of pleadings and other matters of record, no witnesses were tendered, and no objection was made in the trial court to the procedure followed by that court.

3. Whether the trial court had jurisdiction under §3 of the Federal Arbitration Act to decide that GAC was "in default in proceeding with such arbitration" by reason of its waiver of arbitration through inconsistent litigation activities.

4. Whether issues as to violation of the New Mexico antitrust laws, and other issues intertwined therewith, are arbitrable under the Federal Arbitration Act.

STATUTES INVOLVED

Section 3 of the Federal Arbitration Act, 9 U.S.C. §3, is set forth in the petition (Pet. 3-4).

STATEMENT

Contrary to the claim of General Atomic Company ("GAC"), this is not "another chapter in the struggle of General Atomic Company . . . to have a billion-dollar dispute with United Nuclear Corporation ("UNC") resolved in arbitration" (Pet. 5). Rather, it is another chapter in the struggle of GAC to avoid the consequences of its decision to litigate, instead of arbitrate, its principal disputes with UNC, and thus to escape liability for its participation in a vicious price-fixing uranium cartel and avoid the consequences of its massive failures to comply with discovery orders regarding its illegal participation in that cartel.[1]

The only issues properly before this Court on GAC's present petition are those relating to a judgment of the New Mexico Supreme Court affirming a December 27, 1977 order by the trial court denying GAC's motion under 9 U.S.C. §3 for a stay pending arbitration. The default and declaratory judgments subsequently entered by the trial court by reason of GAC's persistent bad faith non-compliance with discovery orders are now on appeal before the New Mexico Supreme Court, were not dealt with in the judgment which GAC now seeks to have this Court review, and thus are not properly involved in the petition here despite GAC's suggestions to the contrary.[2]

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[1] One of GAC's constituent partners, Gulf Oil Corporation ("Gulf") pleaded *nolo contendere* in May, 1978 to a criminal information brought by the United States relating to Gulf's participation in the uranium cartel. *United States v. Gulf Oil Corporation*, Criminal No. 78-123 (W.D.Pa.).

[2] The ultimate result of those judgments was the cancellation of the two contracts between UNC and GAC and the award of net damages to UNC of $236,425. Should the Court wish to be informed as to the true facts underlying the entry of the Rule 37 default against GAC, the trial court's March 27, 1978 Amended Sanctions Order and Default Judgment (which is pending on appeal) is set forth in Appendix A hereto, pp. A1-22.

There also is no issue in this case as to the honesty, integrity or good faith of the New Mexico courts. Despite GAC's innuendos, there is absolutely no basis for a contention that the trial judge[3] or any member of the New Mexico Supreme Court who participated in the decision below has exhibited or is guilty of bias, prejudice or corruption.[4] GAC's accusations to the effect that the New Mexico courts, by refusing to stay proceedings in the case pending arbitration, disregarded the mandates of this Court in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) and 436 U.S. 493 (1978), are completely unfounded. Among other things, as we shall show, this Court in its second *Felter* decision expressly rejected a similar contention and held that its decisions "did not preclude the [trial] court from making findings whether GAC had waived any right to arbitrate" or "prevent the Santa

[3]The Hon. Edwin L. Felter was recently appointed to the New Mexico Supreme Court after receiving an "exceptionally well qualified" rating by the judicial selection committee of the New Mexico Bar Association. At the commencement of the litigation, GAC did disqualify the trial judge initially assigned to the case — the Hon. Santiago E. Campos, who is now a United States District Judge for the District of New Mexico. Two weeks after trial commenced GAC sought unsuccessfully to disqualify Judge Felter, which issue is pending on appeal to the New Mexico Supreme Court and is not involved here. GAC did not move to disqualify any of the members of the New Mexico Supreme Court.

[4]There also is no issue here as to the qualifications of counsel for UNC. GAC's reference (Pet. 14 n. 12) to a motion to disqualify a law firm representing UNC is pointless, except as an unwarranted effort to engender suspicion, since as GAC admits in that footnote the denial of its motion is now pending on appeal to the New Mexico Supreme Court and is not involved here. GAC's reference in the same footnote to the fact that one of UNC's attorneys formerly was a member of the New Mexico Supreme Court is even more reprehensible than its mention of the disqualification motion and is as irrelevant as the fact that one of GAC's lead attorneys, the Hon. William R. Federici, was appointed to the New Mexico Supreme Court during the pendency of this action. GAC has never sought at any time to establish that the UNC attorney's participation in the litigation was improper for that reason, that he has attempted in any way to utilize his former position to influence the actions of the New Mexico courts, or that any New Mexico court has been influenced by that fact. We categorically deny that there is any basis for any such contention, and, of course, we make no such contention with respect to Justice Federici.

Fe court, on the basis of such findings, from declining to stay its own proceedings pending arbitration in other forums." 436 U.S. at 496-97. And, as we shall also show, those findings and the denial of a stay pending arbitration are firmly grounded in the facts of record and are soundly based upon principles established by the Federal courts under the Federal Arbitration Act.

Since GAC's Statement in its petition virtually ignores the findings by the trial court, which were upheld in all respects by the New Mexico Supreme Court, and otherwise gives a highly distorted impression of the facts relevant to the judgment sought to be reviewed, a relatively full Statement on UNC's part is necessary in order to provide this Court with the facts pertinent to its decision whether to grant or deny the petition.

A. The Background to this Litigation.

In 1971, UNC and Gulf agreed to form jointly a third company — Gulf United Nuclear Fuels Corporation ("GUNF") — to manufacture and sell nuclear fuel for commercial reactors. At the time, UNC was both a major producer of uranium in New Mexico and a fabricator of nuclear fuel assemblies for light water reactors. Gulf was then in the process of developing uranium mines in both Canada and New Mexico and a high-temperature gas-cooled reactor business. UNC's contribution to GUNF was to be its fuel-assembly expertise, facilities and employees, and also two contracts and five letters of intent to supply nuclear fuel to a number of electric utilities.[5] Gulf controlled GUNF through

[5]GAC asserts that by 1971, when GUNF was formed, UNC was committed to supply the uranium that was the subject of the 1973 Supply Agreement (Pet. 8 n. 3). That statement is incorrect and was hotly disputed at trial. When UNC and Gulf agreed to form GUNF, UNC was committed to supply only a relatively small amount of uranium to Indiana & Michigan Electric Co. ("I&M") and to Commonwealth Edison for its Dresden reactor. In addition, in reliance upon Gulf's promise to supply uranium, UNC was negotiating a

its appointment of eight of the ten GUNF directors and was to contribute new capital to it. Further, Gulf was to supply uranium for the existing business contributed to GUNF by UNC, and was to supply GUNF with the uranium needed for new fuel fabrication business.[6]

Unbeknownst to UNC, in 1971 Gulf became a charter member of a uranium cartel, the purposes of which were to fix uranium prices, allocate markets and eliminate competition both from competing uranium suppliers such as UNC, and from "middlemen," such as GUNF and Westinghouse, who buy uranium for resale. This cartel controlled at least 74% of the free world's uranium. Certain of Gulf's San Diego employees, who were on the GUNF Board of Directors and later became GAC employees, actually attended cartel meetings and discussed the cartel's adverse impact on GUNF. After the cartel was formed, Gulf denied GUNF the capital and supply of uranium it had agreed to furnish, and GUNF began to sustain large losses.

Rendered vulnerable by GUNF's losses, UNC was coerced into selling its interest in GUNF to Gulf in the summer of 1973 and was forced to enter into an agreement with Gulf (the "1973 Supply Agreement") to supply GUNF and Gulf with approximately 24 million pounds of uranium over a period of years. Article XVII of the 1973 Supply Agreement contains the arbitration clause (Pet. App. 54a) which GAC relies upon in the

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contract with Commonwealth Edison for its LaSalle reactor. It also had obtained non-binding letters of intent to furnish nuclear fuels for four utilities, two of which never ripened into contracts. Contracts with Detroit Edison and Duke Power Co. were entered into by GUNF in March and November of 1973. The Duke Power contract was entered into by GUNF after UNC was no longer a stockholder in GUNF.

[6]The statements in this paragraph and in the following two paragraphs are based upon UNC's evidence at the trial.

present proceeding. Later in 1973, GUNF was merged into Gulf and, effective January 1, 1974, GAC was formed as a partnership by Gulf and Scallop Nuclear, Inc. to succeed to the assets and liabilities of Gulf's nuclear business.[7] The 1973 Supply Agreement was assigned by Gulf to GAC shortly thereafter and, in the summer of 1974, UNC entered into another agreement with GAC (the "1974 Concentrates Agreement") to supply three million additional pounds of uranium to GAC. The 1974 Concentrates Agreement did not contain an arbitration clause and is not involved here.

Disputes between GAC and UNC concerning the validity and enforceability of the 1973 Supply Agreement first arose in 1975. On August 8, 1975, after attempts between the parties to resolve those disputes proved unavailing, UNC filed an action (Case No. 50044) against GAC and its constituent partners in the Santa Fe County, New Mexico, District Court ("the first case"). The complaint sought a declaratory judgment that the 1973 Supply Agreement was void and unenforceable on the grounds that it violated New Mexico's antitrust laws and that it was obtained by Gulf by numerous acts of fraud, economic coercion and breaches of fiduciary duties owed to UNC. Excuse from performance also was asserted on the ground of commercial impracticability. Case No. 50044 was removed by Gulf to the United States District Court for the District of New Mexico on the asserted ground that the complaint stated a separate and independent claim against Gulf. Before any action was taken upon UNC's motion to remand the case to the State court, on December 31, 1975, UNC voluntarily dismissed its complaint under Rule 41(a)(1).

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[7]Scallop is a Delaware corporation. Since UNC also is a Delaware corporation, diversity of citizenship has never existed between UNC and GAC — at least until recently. In 1979 Gulf purchased Scallop's interest in GAC's uranium business, including the 1973 Supply Agreement, and diversity is now believed to exist.

F.R.Civ.P. and filed another complaint asserting the identical claims against GAC alone in the Santa Fe State Court (Case No. 50827 ["the second case"]).[8] UNC also refiled the extensive interrogatories it had served upon GAC in the first case. See Pet. App. 44a-45a, F. 3, 6.

B. GAC's Decisions to Litigate.

During the period of more than four months in which the first case was pending, neither GAC nor its member partners demanded arbitration or moved for an order staying further proceedings pending arbitration. However, they did move for extensions of time within which to respond to the complaint and interrogatories on the ground that more "time was necessary to determine whether to seek arbitration," indicating a recognition that any right to arbitration might be waived if not timely asserted. See Pet. App. 44a, F. 4 and 5.[9]

It soon became apparent from GAC's actions following the filing of the second complaint (together with the interrogatories) in the Santa Fe court, on December 31, 1975, that GAC had opted for litigation rather than arbitration, and very vigorous litigation at that. On January 14, 1976, GAC moved for an extension of time within which to answer the interrogatories. While that motion (which was granted) contained a *pro forma* statement that the extension was sought by GAC "without

[8] Contrary to the assertion of GAC (Pet. 9), UNC did not seek to avoid Federal jurisdiction by dismissing its complaint in Case No. 50044. A debatable question existed as to whether the Federal court had removal jurisdiction. Hence, a substantial risk was involved under the decision in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), which holds that a party who removes a case and loses on the merits may urge on appeal that his own removal was improper.

[9] The arbitration clause contained in Art. XVII of the 1973 Supply Agreement (Pet. App. 54a) provides that either party may "elect" to submit disputes to arbitration.

waiving its right to demand arbitration," the extension was sought on grounds that more time was needed to prepare answers rather than to decide whether to demand arbitration. Even that reservation was not included in a written agreement made by GAC and Gulf with UNC, filed on March 12, 1976, to fully answer the interrogatories and produce documents in return for withdrawal of UNC's motion for default judgment based upon GAC's failure to answer the interrogatories within the extended time allowed by the trial court. See Pet. App. 4a-5a. And, as we point out more fully at pp. 13-15, *infra*, when GAC answered the complaint, on May 5, 1976, it specifically renounced arbitration of any issues "concerning the validity and enforceability of the 1973 Uranium Supply Agreement."

In the meantime, GAC disqualified the trial judge initially assigned to the case by filing (on January 14, 1976) an affidavit of bias or prejudice; filed (on February 23, 1976) a motion to dismiss for lack of *in personam* jurisdiction; and filed (on March 9, 1976) a motion to dismiss for failure to join indispensable parties. See Pet. App. 4a-5a. And, on January 19, 1976, GAC filed in the United States District Court for the District of New Mexico a Federal statutory interpleader action against UNC and others, requesting that court, *inter alia*, to issue a declaration as to the rights of UNC and GAC under the 1973 Supply Agreement.[10] GAC made no demand for arbitration in the interpleader action. After that case was dismissed for lack of subject matter jurisdiction, GAC noticed an

[10] On January 20, 1976, Gulf also filed an action against UNC in the New Mexico Federal District Court, alleging that UNC had contractually released the claims being asserted against GAC in the second Santa Fe case. *Gulf Oil Corporation v. United Nuclear Corporation*, No. 73-032-B (D.N.M. 1976). This case was dismissed nine months later on the ground that the issues were being litigated in Santa Fe. No assertion of a right to arbitrate was ever made during the pendency of this action.

appeal to the Tenth Circuit, which affirmed the dismissal. *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977).[11] See Pet. App. 45a, F. 7.

All of the foregoing litigation activities by GAC, except for the answer to the complaint, occurred before the April 2, 1976, injunction by the trial court which GAC now contends prevented it from moving that court to stay its proceedings pending arbitration. At no time during the nine months preceding April 2, 1976 — a period of time when GAC was involved with UNC in three different lawsuits concerning the 1973 Supply Agreement — did GAC give UNC or any court notice of an election that it wished to arbitrate its 1973 Supply Agreement disputes with UNC. Indeed, GAC told the trial judge during this period that ". . . New Mexico provided the only or best forum for the vindication of its rights in various matters." See Pet. App. 5a.

C. The April 2, 1976 Injunction.

On April 2, 1976, the trial court issued a preliminary injunction restraining GAC "from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action," including "the institution or prosecution of ordinary litigation, third-party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject

[11] GAC named the four utilities, as well as UNC, as parties in the interpleader. The utilities specifically disclaimed any interest in the 1973 Supply Agreement between UNC and GAC.

matter of this lawsuit, or including United Nuclear Corporation as a party thereto."[12] At the request of GAC, the injunction subjected UNC to the same restraint in regard to proceedings against GAC.[13]

On its face, therefore, that injunction affected what the parties might do "in any other forum" but did not affect what they might do in the Santa Fe court. As that court found in its December 27, 1977 order, the "injunction did not prohibit GAC from demanding arbitration with UNC in this forum." Pet. App. 47a, F. 13. Indeed, the concerns that gave rise to the injunction did not involve arbitration of the issues in this case as to the validity and enforceability of the 1973 Supply Agreement; rather, the "injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities" under arbitration clauses in their contracts with GAC *(ibid.)*. *See also, General Atomic Co. v. Felter*, 434 U.S. 12, 13-14 (1977). "What the New Mexico Supreme Court has described as 'harassment' [in upholding the injunction] is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits and federal arbitration proceedings brought against it by the utilities." *Id.* at 18.

[12] GAC does not quote the full text of the ordering paragraph (Pet. 12). The paragraph is quoted in full in *General Atomic Co. v. Felter*, 434 U.S. 12, 14 n.4 (1977).

[13] On April 2, 1976, the trial court also denied GAC's motion to dismiss for lack of *in personam* jurisdiction, and at GAC's request certified the matter for an interlocutory appeal. GAC thereafter moved for a stay of proceedings pending appellate determination of the jurisdictional issue. However, GAC did not ask the trial court for a stay pending appellate review of the April 2, 1976 preliminary injunction or pending arbitration of the material disputes.

The only mention of arbitration under the arbitration clause in the 1973 Supply Agreement occurred in a hearing on April 2, 1976 concerning the form of the injunction to be entered. After GAC's counsel referred to that arbitration clause and called attention to the New Mexico Arbitration Act, there was a colloquy between the trial judge and counsel which is set forth at length in the opinion of the New Mexico Supreme Court (Pet. App. 6a-8a). GAC's counsel noted that he had "raised the question of the *possibility* of the Defendants desiring to exercise their rights to arbitration *in this case*" under the arbitration clause in the 1973 Supply Agreement and the New Mexico Arbitration Act. The trial judge asked if such arbitration would be "[s]ubject to the supervision of this court." GAC's counsel replied "*/t/hat is correct,*" and went on to "ask that the Injunction be clear in excluding any prohibition against us demanding arbitration *in this case*." (Emphasis by the Court.) UNC's counsel asserted that it was "clear enough" and assured the trial judge that UNC had not sought to enjoin such arbitration by GAC.[14] Finally, referring to the text of the proposed injunction, the trial judge advised the parties:

> I don't think there is anything in the language here that relates to arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it that can be clarified.

GAC did not mention the Federal Arbitration Act or otherwise urge that it had a Federal right to arbitrate the issues as to the validity and enforceability of the 1973 Supply Agreement during the proceedings that led to the injunction (Pet. App. 6a). At no time did GAC accept the trial court's offer to

[14] UNC's counsel also noted, *inter alia*, that although he had asked repeatedly whether GAC wanted to arbitrate, GAC had never answered; and that he believed that GAC had waived arbitration, but "[t]hat is not the point that I wanted an Injunction on." Pet. App. 8a.

clarify the injunction if GAC had questions relating to arbitration (*id.* 21a). And, as we shall show, more than 19 months of intensive litigation followed entry of the injunction on April 2, 1976 before GAC, for the first time, demanded arbitration of the issues in the case as to the validity and enforceability of the 1973 Supply Agreement, moved for a stay pending arbitration and presented to the trial court a claimed right to arbitrate under the Federal Arbitration Act.

D. GAC's Failure to Seek Arbitration After April 2, 1976.

On April 14, 1976, the New Mexico Supreme Court issued an alternative writ of prohibition, in the form submitted by GAC, staying enforcement of the April 2 injunction, which stay was not quashed until June 16, 1976. *See General Atomic Co. v. Felter, supra*, 434 U.S. at 14. On May 5, 1976, while that stay was in effect, GAC filed its answer to the complaint and counterclaimed against UNC. See Pet. App. 45a-46a, F. 9. While that pleading was prefaced by an express reservation of GAC's "objection to the court's jurisdiction over its person" which objection had been overruled by the trial court on April 2 (see n. 13, p. 11 *supra*), no such reservation was made in regard to the April 2 injunction, and GAC stated its "Answer as to all matters in which arbitration is not being sought by Defendant and as to all issues which the Court may deem unarbitrable." The eighth defense of the answer contains GAC's only additional mention of arbitration.

The eighth defense (App. B hereto) included allegations that "some" unspecified "issues in this case are subject to arbitration pursuant to Article XVII" of the 1973 Supply Agreement; that UNC is also "bound by the arbitration provisions" of certain contracts between GAC and two utility companies; that the utility companies had demanded arbitration with GAC under two of those contracts and might do so on the third; and that

UNC's "obligations to General Atomic may be affected" by those arbitration proceedings. GAC went on in its eighth defense to state that it "demands arbitration" of "only" those issues which GAC is ultimately required to arbitrate with the utility companies, but:

> Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement.

The utility contracts under which GAC thus demanded arbitration with UNC in its answer to the complaint in this case were the utility contracts involved in the judicial and arbitration proceedings which provided the basis for the April 2, 1976 injunction. See p. 11 *supra*.[15] Hence, by thus demanding arbitration with UNC in regard to issues arbitrated with the utilities under those contracts, GAC made unmistakably clear that it did not regard the April 2 injunction as preventing it from demanding arbitration with UNC. And, GAC made equally clear that it did not intend to arbitrate any issues under the 1973 Supply Agreement by expressly excluding from its arbitration demand "all other arbitrable issues, including any concerning the validity and enforceability of" that Agreement. See Pet. App. 46a, F. 10. Moreover, GAC's election to litigate, rather than to

[15] Those utility contracts were between GAC and Commonwealth Edison (two contracts) and Duke Power Company. GAC and Duke settled their arbitration dispute on December 14, 1977. Commonwealth Edison gave notice of demand for arbitration with GAC, Gulf and UNC under the LaSalle reactor contract on October 29, 1974. UNC was joined by Commonwealth Edison and has been a party to the arbitration since its inception. That arbitration is still in the pre-hearing stage and, while GAC has cross-claimed against UNC, to this day, GAC and Gulf have made no claim against UNC in that proceeding relating to the validity or enforceability of the 1973 Supply Agreement. Commonwealth Edison has never demanded or instituted arbitration under its Dresden contract with GAC.

arbitrate, the issues relating to the 1973 Supply Agreement was confirmed by its counterclaim which requested the court to specifically enforce that Agreement and award actual and punitive damages for its breach and for UNC's alleged violation of the New Mexico Antitrust laws, without any reference to arbitration. See Pet. App. 45a-46a, F. 9.

GAC petitioned this Court for a writ of certiorari to review the June 16, 1976 decision of the New Mexico Supreme Court quashing its alternative writ staying enforcement of the April 2, 1976 injunction, but did not make any reference to arbitration under the Federal Arbitration Act in that petition (No. 76-385). After this Court remanded the case to the New Mexico Supreme Court "to consider whether its judgment was based upon federal or state grounds, or both," that Court reaffirmed its judgment and sustained "the injunction on the ground that its issuance was within the inherent equity jurisdiction of the Santa Fe court and was not prohibited by *Donovan v. City of Dallas*, 377 U.S. 408 . . . (1964)." *General Atomic Co. v. Felter, supra.* 434 U.S. at 14-15. It was not until May 23, 1977, when GAC filed its second petition for writ of certiorari (No. 76-1640) in this Court to review that decision, that GAC first mentioned a right to arbitration under the Federal Arbitration Act and then only in relation to joining UNC in the GAC-utility arbitrations. GAC did not rely upon that Act in the New Mexico courts until it sought, in November of 1977, the stay of proceedings under 9 U.S.C. §3 pending arbitration which gave rise to the instant petition.

During the period that followed the filing of its answer and counterclaim, GAC obtained the joinder of I&M and Detroit Edison as parties to the case,[16] and engaged in extensive pretrial discovery against UNC (*i.e.*, by taking more than 100 depositions, totalling more than 16,000 pages and involving

[16] See Respondent I& M's Brief In Opposition.

2,785 deposition exhibits, by propounding two voluminous sets of interrogatories to UNC, and by copying more than 500,000 pages of UNC's records). See Pet. App. 47a, F. 15 and 16. GAC drafted the portion of a pretrial order, entered on August 22, 1977, setting forth its claims against UNC, without referring to a claim or demand for arbitration. See Pet. App. 9a; 47a, F. 17. In September 1977, after its discovery was completed, GAC moved for summary judgment on UNC's claims of state antitrust law violation, fraud, economic coercion and commercial impracticability. The motion was denied on October 27, 1977. See Pet. App. 47a-48a. F. 18. On the following day, GAC petitioned the New Mexico Supreme Court to stay the trial of the case, which was set for October 31, 1977, on the ground that it needed more time to prepare for trial — not to arbitrate the 1973 Supply Agreement disputes. The petition was denied, and the trial commenced on the appointed date, 22 months after UNC's complaint in the second Santa Fe case was filed. See Pet. App. 48a, F. 19 and 20.

In the course of these months, GAC repeatedly sought and obtained extensions of time and discovery orders from the trial court on the asserted ground that the orders were necessary in order for it to prepare for trial. It repeatedly invoked the appellate jurisdiction of the New Mexico courts on rulings not to its liking. See Pet. App. 48a, F. 20 and 21. But, as the trial court found (Pet. App. 46a, F. 12):

> At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

E. GAC's Motion for a Stay Pending Arbitration.

By its *per curiam* decision of October 31, 1977, this Court granted GAC's second petition for writ of certiorari and reversed the New Mexico Supreme Court's decision approving the April 2, 1976 injunction. *General Atomic Co. v. Felter*, 434 U.S. 12 (1977). Specifically, this Court held that the Supremacy Clause and its *Donovan* decision, *supra*, prohibit a State court from enjoining a party from initiating subsequent *in personam* actions in Federal courts or invoking Federal rights. This Court did not hold, however, that GAC had a right to arbitrate disputes relating to the 1973 Supply Agreement or that GAC had not waived any such right before or after April 2, 1976, and it did not hold that the trial court's proceedings should be stayed pending arbitration.

The mandate of the New Mexico Supreme Court, following its receipt of this Court's mandate, was received by the trial court on November 28, 1977. The trial court immediately amended the April 2, 1976 injunction "to exclude from its terms and conditions all *in personam* actions in Federal courts and all other matters mandated to be excluded from the operation of said injunction" by this Court's decision.

GAC did not object to the trial court's amending order. However, GAC declared in the trial court that it intended to seek arbitration and orally requested a stay of the trial then in progress, which request was denied. See Pet. App. 48a, F. 22. On the following day, GAC filed its demand to arbitrate the validity and enforceability of the 1973 Supply Agreement disputes with the American Arbitration Association in San Diego.[17] On November 30, 1977, GAC filed a motion for a stay of

[17] At the same time, GAC also filed two other arbitration demands against UNC: the first sought to join or bring UNC into the then pending Duke-GAC arbitration proceeding, which was subsequently settled on December 14, 1977. The second demand was a GAC cross-claim against UNC in the

proceedings in the trial court pending arbitration. See Pet. App. 48a, F. 23. UNC responded on December 6, 1977, by resisting GAC's motion on waiver and other grounds and by filing a motion for an order staying arbitration. The trial court notified the parties to submit their papers on the facts and law. GAC did not object to the sufficiency of this procedure and did not tender any oral testimony or affidavits raising questions of fact regarding UNC's claim of waiver. See Pet. App. 30a.

On December 16, 1977, the trial court entered an order granting UNC's motion staying arbitration and, on December 27, 1977, the order denying GAC's motion for a stay pending arbitration was entered (Pet. App. 52a). The trial court entered substantially identical findings and conclusions in connection with both orders. On the basis of extensive findings (Pet. App. 43a-49a), the trial court concluded (Pet. App. 50a), *inter alia*, that it had jurisdiction under both the Federal and State arbitration acts "to determine whether GAC may properly demand arbitration from UNC"; that "GAC has waived any rights to demand arbitration from UNC and has been in default in exercising those purported rights"; that "the issues arising under the New Mexico Antitrust Laws . . . may not be submitted to arbitration"; and that "all issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none . . . can properly be submitted to arbitration."

The trial court entered both orders as partial final judgments to facilitate an immediate appeal, which was taken by GAC.

Commonwealth Edison arbitration proceeding to which UNC is a party. GAC's cross-claim, which was allowed by the arbitrator, seeks to prevent UNC from invoking a limitation of liability defense against Commonwealth Edison under the LaSalle reactor fuel contract — it does not relate to the validity or enforceability of the 1973 Supply Agreement.

As the New Mexico Supreme Court stated (Pet. App. 41a), only GAC's San Diego arbitration demand concerning the validity and enforceability of the 1973 Supply Agreement was considered by that court's opinion; and, as GAC makes clear (Pet. 15, 16), it is that same San Diego arbitration demand that is the sole basis of its petition here.

However, on March 3, 1978, while the appeal was pending, GAC petitioned this Court (No. 77-1237) for a writ of mandamus to the trial court to set aside *both* the December 16 and the December 27, 1977 orders on the ground that they violated this Court's earlier decision and mandate. On May 30, 1978, this Court issued its *per curiam* decision granting GAC's petition for writ of mandamus, in which it concluded that, insofar as it stayed arbitration, the December 16, 1977 order of the trial court was contrary to this Court's earlier mandate and to its decision of October 31, 1977. *General Atomic Co. v. Felter*. 436 U.S. 493 (1978).

GAC's petition had asserted that "Judge Felter's 'waiver' theory" had "already been rejected by this Court" and that it was "patently unsound" because the April 2, 1976 injunction "prevented GAC from bringing the issues under the 1973 agreement to arbitration" (Pet. No. 77-1237, at 12-13). However, the Court declined to disturb the December 27, 1977 order, since it did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n. 2), and also because:

> Clearly, our prior opinion did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums. (436 U.S. at 496-97)

F. The Decision of the New Mexico Supreme Court.

The New Mexico Supreme Court's opinion affirming the trial court's December 27, 1977 decision and judgment was issued on

May 7, 1979 (Pet. App. 1a-42a). Among other things that court held:

(1) That the Federal Arbitration Act controlled the arbitration rights of the parties under the 1973 Supply Agreement and the disposition of GAC's November 30, 1977 motion for a stay in this case (Pet. App. 10a-11a);

(2) That under 9 U.S.C. §3, the trial court had the power and duty to determine whether GAC had waived its right to demand arbitration by litigation conduct amounting to a default in proceeding with arbitration (Pet. App. 11a-12a);

(3) That GAC was not entitled under the circumstances to an evidentiary hearing on the issue of waiver (Pet. App. 30a-32a);

(4) That the April 2, 1976 injunction did not prohibit GAC from moving the trial court for a stay pending arbitration or from otherwise asserting in that court a demand for arbitration (Pet. App. 20a-24a);

(5) That the record supported the trial court's findings of fact (Pet. App. 3a-10a, 19a-27a);

(6) That, under the standards established by the Federal courts, the trial court's findings of fact supported its conclusion that GAC had waived its claimed right to arbitrate (Pet. App. 12a-27a, 42a);

(7) That the State antitrust law issues were not arbitrable, and that the other issues raised were so intertwined with and permeated by the State antitrust issues that they too required litigation (Pet. App. 34a-40a);

(8) That the trial court's denial of GAC's motion to stay was not in violation of or inconsistent with this Court's decisions in the two *Felter* cases (Pet. App. 32a-34a).[18]

ARGUMENT

The principal issue before the New Mexico Supreme Court was whether, taking into account all the circumstances of GAC's conduct in the litigation, GAC was in default in proceeding with arbitration and thus was not entitled under 9 U.S.C. §3 to a stay of proceedings in the trial court pending arbitration. GAC, realizing that such a fact-bound question is not appropriate for review by writ of certiorari in this Court, strives mightily to show that the New Mexico Supreme Court somehow acted inconsistently with the decisions of this Court in the two cases captioned *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) and 436 U.S. 493 (1978),[19] and to show that the state courts decided questions of federal law upon which there are substantial divisions of authority in the lower courts. Neither attempt succeeds. This Court made entirely clear, in its second *Felter* decision, that neither that decision nor the first *Felter* decision prohibited the trial court from finding that arbitration had been

[18] GAC's account, on pages 20-21 of its petition, regarding certain other federal proceedings subsequently brought by UNC in regard to GAC's invocation of arbitration is incomplete but is entirely irrelevant here. Those actions simply represent an effort by UNC, in accordance with the decisions by this Court in the *Donovan* case and the two *Felter* cases, to seek to have the Federal — rather than State — courts prevent arbitration of matters that have already been determined in litigation. *See Donovan v. City of Dallas*. 377 U.S. 408, 412 (1964).

[19] In its first *Felter* opinion this Court held that the Supremacy Clause and its *Donovan* opinion, *supra*, prohibit a State court from enjoining a party from initiating subsequent *in personam* actions in Federal courts or invoking Federal rights. In its second *Felter* opinion this Court held that, insofar as the December 16, 1977 judgment stayed any arbitration, it was contrary to the opinion and mandate in the first *Felter* case.

waived or from denying GAC's motion for a stay pending arbitration. GAC elected to litigate rather than arbitrate for more than two years before asserting its alleged arbitration rights, although it was not prevented from moving for a stay of the trial proceedings pending arbitration at any time throughout that period. It must now bear the consequences of its own delay.[20] The decision below accords with accepted legal principles, and GAC presents no question upon which this Court should grant a writ of certiorari.[21]

1. The Waiver Finding by the Courts Below Does Not Conflict with Prior Rulings of this Court and Presents No Substantial Question for Review by this Court.

(a) There is no substance whatsoever to GAC's asserted "principal reason why certiorari should be granted" — that "UNC and the New Mexico courts are now attempting to accomplish the very same result — barring GAC's right to arbitrate — which this Court twice resoundingly condemned in" *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), and *General Atomic Co. v. Felter*, 436 U.S. 493 (1978). See Pet. 25-26; and, generally, 25-33. This Court in the *Felter* cases did not hold that GAC had a "right to arbitrate," but rather condemned state court "interfere[nce] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. The denial by the New Mexico trial court of a stay of its own proceedings pending arbitration does not, of course, "bar" GAC from making any assertions it pleases, however erroneous,

[20] GAC's desire for arbitration of the 1973 Supply Agreement did not manifest itself in this case until November 1977, after its summary judgment motion had been denied and Rule 37 sanction motions were pending against it.

[21] We note that I&M's Brief in Opposition (with which we agree), while properly concentrating upon reasons why certiorari is not appropriate as to I&M's disputes with GAC, also demonstrates that GAC's actions in regard to those disputes are inconsistent with any intention by GAC to arbitrate issues relating to the validity and enforceability of the 1973 Supply Agreement with UNC.

in any "federal forum" it chooses regarding its "views" in regard to "its entitlement to arbitration."

In the second *Felter* case, GAC urged that both the December 16, 1977 order of the trial court staying arbitration and the December 27, 1977 order denying GAC's motion to stay trial proceedings pending arbitration violated this Court's mandate pursuant to the first *Felter* decision. GAC specifically challenged the ruling that it had waived arbitration on the ground that the ruling was contrary to this Court's mandate because some of the inconsistent litigation activities by GAC upon which that ruling was based occurred subsequent to the entry of the April 2, 1976 injunction involved in the first *Felter* decision. While this Court agreed that the December 16, 1977 order violated the Court's prior mandate, it expressly rejected GAC's contention that this was true also of the December 27, 1977 order denying a stay pending arbitration and of the waiver findings therein. See p. 19, *supra*. This Court's mandate "did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate" or "prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 497. And, this Court declined "to disturb" the December 27, 1977 judgment (436 U.S. at 498 n. 2) which is the very judgment that, as affirmed by the New Mexico Supreme Court, GAC seeks in its instant petition to have this Court review.

We do not contend, of course, that this Court in its second *Felter* decision passed upon the merits of the trial court's findings and conclusions that GAC had waived arbitration or of the denial of GAC's motion to stay proceedings in the trial court pending arbitration. But it is entirely clear, from this Court's opinion in the second *Felter* case, that the Court did not regard either the waiver determination or the denial of the motion for a stay pending arbitration to constitute a violation of this Court's mandate in the first *Felter* case, as GAC virtually admits in the

last paragraph (Pet. 32-33) of its first asserted reason for granting its petition. In short, it is GAC — not UNC or the New Mexico courts — which is now making arguments premised upon an erroneous interpretation of this Court's *Felter* decisions.[22]

(b) Once GAC's fundamental premise that the New Mexico courts have "nullified," "evaded" or otherwise violated this Court's *Felter* decisions is cleared away, GAC's other arguments concerning waiver — all of which ultimately depend upon that fundamental premise — clearly are not worthy of review by this Court. At most, those arguments turn upon the facts and circumstances of this particular case, rather than upon issues of Federal law that have general importance or as to which the courts are in conflict.

Thus, GAC does not contend that the general legal principles applied by the New Mexico Supreme Court in passing upon the waiver determination are contrary to generally accepted Federal standards. Indeed, that court fully acknowledged the "strong federal policy favoring the enforcement of arbitration agreements" (Pet. App. 12a), and the "heavy burden of proving waiver" placed upon the party asserting such a default (*id.* 13a); it relied throughout its opinion upon principles established by the Federal courts in determining whether or not a party had waived its rights to arbitration (*id.* 12a-19a).

GAC does contend that, in determining that GAC waived arbitration, the New Mexico courts erred in considering GAC's inconsistent litigation activities after the entry of the April 2, 1976 injunction because "[d]uring the time GAC was enjoined, it had no choice but to forswear federal arbitration temporarily and defend, as vigorously as possible, the litigation in Santa Fe which UNC had instituted" (Pet. 26). But apart from other weaknessess, which we discuss below, that contention depends

[22] *See* Annot. 54 L.Ed.2d 921, 925 (1979).

entirely upon GAC's interpretation of the April 2, 1976 injunction, which interpretation concededly is contrary to that of the New Mexico courts (Pet. 28-31).[23] Surely a contention that the New Mexico courts misinterpreted their own order is a unique issue that has no general importance warranting review by this Court.

(c) GAC's argument that the April 2, 1976 injunction gave it "no choice but to forswear federal arbitration temporarily and defend, as vigorously as possible, the litigation in Santa Fe" is erroneous as well as unique to this particular case.

On its face, that injunction simply restrained GAC "from filing or prosecuting any other action or actions against" UNC, including "arbitration proceedings," in "any other forum" (see pp. 10-11, *supra*) and thus in no way prevented GAC from moving the Santa Fe court for a stay pending arbitration pursuant to §3 of the Federal Arbitration Act or from otherwise apprising the trial court that GAC wanted to arbitrate rather than litigate.[24] If GAC had any doubt about that from the

[23] GAC's contention that "[w]hat GAC did after it was enjoined from seeking relief in other forums constituted 'purely necessary defensive action[s]' " (Pet. 35) is also dependent upon its interpretation of the April 2, 1976 injunction as preventing it from requesting the New Mexico trial court to stay its proceedings pending arbitration. The same weakness is exposed in GAC's reliance upon a purported "uniform rule in the federal courts . . . that the very earliest time that a defendant in a civil action need elect whether to proceed with litigation or demand arbitration is when he joins issue by filing an answer to the complaint" (Pet. 33), since GAC contends that it was prevented from making that election in its answer because of its current interpretation of the April 2, 1976 injunction (Pet. 34). Of course, both of those contentions also suffer from other defects (see pp. 29-31, *infra*).

[24] The language of 9 U.S.C. §3 and applicable authorities all indicate that, since a court proceeding was pending, GAC should have attempted to vindicate its claimed arbitration rights by seeking a stay of that proceeding pending arbitration. *See, e.g., Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972); *United Electrical, R. & M. Workers v. Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953); *William S. Gray & Co. v. Western Borax Co.*, 99 F.2d 239, 240 (9th Cir. 1938); Goldberg, *A Lawyer's Guide to Commercial Arbitration*, §1.06, p. 18 (ALI-ABA 1977). GAC had no need to file a formal

language of the injunction, it should have been removed by the colloquy between the trial judge and counsel during the hearing on April 2, 1976 (see p. 12, *supra*).[25]

Moreover, if GAC still had doubts, the trial judge at the conclusion of that colloquy stated, "[i]f there is any question about it that can be clarified." Yet GAC sought no clarification. As the New Mexico Supreme Court stated (Pet. App. 21a-22a):

> Although the [trial] court offered clarification of what was meant by a right to arbitrate 'in this forum,' *none was ever requested at that time or any later time, nor was any effort made to determine what the judge meant when he said that if GAC decided to exercise its rights to arbitration it would be done 'subject to the supervision of this court.'* The latter expression could be interpreted in many ways, one of which could be that the judge believed that he had the power to refuse to stay the proceedings if the evidence

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arbitration demand, whether in New Mexico or elsewhere, prior to moving for such a stay. *General Guar. Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970). After a stay under 9 U.S.C. §3 is granted, there is "nothing left but to proceed to arbitration, such arbitration is effectuated by the court by staying the trial until arbitration has been had." *Donahue v. Susquehanna Collieries Co.*, 160 F.2d 661, 664 (3d Cir. 1947). *See The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 44 (1944). In short, as was done by a party in *Drake Bakeries, Inc. v. Local 50, American Bakery*, 370 U.S. 254, 266-67 (1962), GAC should have "insist[ed] upon its right to arbitrate" by "promptly . . . moving for a stay in the District Court." That GAC was aware that the April 2, 1976 injunction did not prevent it from seeking such a stay is further confirmed by its reference to the stay provisions of the New Mexico Arbitration Act at the April 2, 1976 hearing. See Pet. App. 21a.

[25] *See, American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir. 1948), *cert. denied*, 336 U.S. 909 (1949), where the Court rejected a party's attempt to excuse its failure to file a motion for a stay under 9 U.S.C. §3, on the ground that it was prevented from doing so by an order staying all further proceedings pending the completion of discovery, since it "was clear from the statements of the District Judge at the time that appropriate motions would still be received and considered" and it was not reasonable in any event to construe the prior order as being intended to bar such motions.

> showed a default on GAC's part in demanding arbitration that amounted to a waiver. Another probability is that the court would want to retain jurisdiction over any contested items in the contract that were not subject to arbitration. Furthermore, the court would have the jurisdiction to inquire whether or not there was in fact a valid contract providing for arbitration. *No clarification was sought and none was thereafter offered.* (Emphasis added.)

GAC did not seek clarification or move for a stay pending arbitration. It did not move for a stay of proceedings pending review by the New Mexico Supreme Court and this Court of the April 2, 1976 injunction. GAC did not even advise UNC or the trial court that it desired to arbitrate issues relating to the validity and enforceability of the 1973 Supply Agreement. It continued to litigate, including engaging in very extensive and expensive discovery against UNC, filing a motion for summary judgment, and even commencing trial without ever apprising the trial court that it wanted to arbitrate the validity and enforceability of the 1973 Supply Agreement or even that it claimed such a right under the Federal Arbitration Act. See pp. 13-16 , *supra*. The New Mexico Supreme Court correctly summed up the impression given by the totality of circumstances in this case when it said (Pet. App. 22a):

> Common sense dictates that a litigant that has been so capably repesented by such a host of outstanding lawyers, who have meticulously handled every other infinitesimal detail, and who have verbally displayed such ferocious passion for arbitration, could have found a way to say: 'Judge, we want to arbitrate.'

Though not prevented from doing so, GAC never uttered those words until November 28, 1977, more than two years after

litigation commenced and almost a month after it had gone to trial. The determination by the New Mexico courts that GAC thereby waived arbitration was amply justified and presents no substantial federal question for this Court.

Indeed, while the courts below did not reach the issue, there is ample basis for a determination that GAC's litigation activities prior to April 2, 1976 — including the filing of the interpleader action in which GAC itself requested the courts to decide the issues relating to the 1973 Supply Agreement[26] — were, by themselves, so inconsistent with a desire to arbitrate as to constitute a default or waiver. So, too, while GAC in the first case filed by UNC sought an extension of time, before responding to the complaint and interrogatories, in which to "determine whether to seek arbitration," no such reason was asserted as the basis for similar extensions of time requested before April 2, 1976 in the present case, and GAC and Gulf entered into an agreement to answer the interrogatories and produce documents without asserting or referring to a right to arbitration. See pp. 8-10, *supra*.

In addition, when GAC filed its answer and counterclaim, on May 5, 1976, the New Mexico Supreme Court had issued an alternative writ of prohibition staying the effectiveness of the April 2, 1976 injunction. See p. 13, *supra*. GAC's eighth defense asserted in its answer included a demand for arbitration with UNC of issues that GAC might be required to arbitrate under certain of its contracts with two utility companies, so GAC plainly did not then consider the assertion of an arbitration

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[26] *See, e.g., Gutor International AG v. Raymond Packer Co., Inc.*, 493 F.2d 938, 945 (1st Cir. 1974); *Ferber Company v. Ondrick*, 310 F.2d 462, 464-65 (1st Cir. 1962), *cert. denied*, 373 U.S. 911 (1963); *Bank of Madison v. Graber*, 158 F.2d 137, 140 (7th Cir. 1946); *Galion Iron Works & Mfg. Co. v. J.D. Adams Mfg. Co.*, 128 F.2d 411, 413 (7th Cir. 1942), for the inconsistency of that action with a subsequent claim for arbitration.

demand in its answer to be barred by the April 2, 1976 injunction. Yet, GAC went on in that eighth defense to "[s]pecifically exclude from the scope of this arbitration demand . . . all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement." See pp. 13-14, *supra*. This express disclaimer of arbitration "concerning the validity and enforceability of the 1973 Agreement" by GAC in its answer obviously was not necessitated by the April 2, 1976 injunction. GAC's affirmative election to litigate the issues concerning the 1973 Supply Agreement was further confirmed by its counterclaim requesting judicial decision of those issues in its favor, enforcement of that agreement and damages. See p. 15, *supra*.

We note in this regard GAC's reliance (Pet. 33) upon a purported "uniform rule in the federal courts" that "the very earliest time that a defendant in a civil action need elect whether to proceed with litigation or demand arbitration is when he joins issue by filing an answer to the complaint." The cases cited to support that proposition are not in point for they all concern the question whether a party with a right to arbitration may file a lawsuit and then, before the other side has answered, assert its right to arbitrate. But even according to GAC's theory, it must have asserted its claimed right to arbitrate at least by the time of its answer.[27] GAC now attempts to excuse its failure to assert such a demand in its answer by reason of the April 2, 1976 injunction (Pet. 34). But as we have shown GAC certainly did not so construe that injunction when it filed its answer, and the injunction plainly did not require GAC to include in its answer

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[27] We note that GAC's January 1976 interpleader complaint seeking to litigate the validity and enforceability of the 1973 Agreement was an effective "answer" in the plainest terms to UNC's complaint in the second Santa Fe case that clearly indicated an election to litigate, and not to arbitrate, the disputes. A similar election to litigate was voiced by the January 1976 action Gulf filed against UNC seeking to litigate issues which were pending in the Santa Fe action. *See, General Atomic Co. v. Felter*, 434 U.S. at 13, n. 2.

the express waiver of arbitration.[28] Moreover, unlike the defendant in *Hilti v Oldach*, 392 F. 2d 368, 371 (1st Cir. 1968), GAC did "irrevocably lock litigious horns by filing a counterclaim" for judicial decision of the issues in its favor as well as failing in its answer to "serve [ ] notice on plaintiff of the arbitration defense." See pp. 14-15 *supra*.

(d) GAC's contention (Pet. 35) that the courts below ignored the principle that there can be no waiver of arbitration by a party who participates fully in litigation while his claim to arbitration is *sub judice*, *General Guar. Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 929 (5th Cir. 1970), stumbles on one significant obstacle: GAC elected not to put its right to arbitrate *sub judice* until November 1977 — when it finally put the matter in issue by asking for a stay of trial proceedings pending arbitration. In the *General Guaranty Insurance Co.* case, the party seeking arbitration had moved promptly for a stay and then defended the litigation after denial of the motion. GAC's reliance on *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 20 (1972), is similarly misplaced. When that case was brought in a forum other than the one designated in a forum-selection clause, the defendant immediately moved to dismiss for that reason. That motion had not been ruled upon when it became necessary for the defendant to file an allegedly inconsistent limitation-of-liability action in the same forum if it was to avoid having its rights in that regard barred by a statute of limitations. In filing such an action, the defendant expressly reserved all rights under its motion to dismiss and reasserted its contentions as to the proper forum. 407 U.S. at 4-5. Since the defendant had "no other prudent course of action" under the circumstances, the filing of that action did not constitute a waiver of its objections to the forum. 407 U.S. at 19-20. GAC, on the other hand, neither

[28] That the April 2, 1976 injunction did not prevent GAC from asserting its claimed rights to arbitration is further demonstrated by the fact that during the pendency of the injunction, GAC sent UNC a "notice" requesting UNC to join the Duke arbitration and purporting to "vouch" UNC into that arbitration. The trial court ruled that GAC's arbitration notice was not a violation of the injunction.

filed a motion for a stay pending arbitration or otherwise asserted in the trial court a contention that arbitration was the proper forum until after it had engaged in the inconsistent litigation activities found to constitute a waiver of litigation.

The only relevance of those cases for present purposes, therefore, is to illustrate that there was a course of action which GAC could have followed both to assert a contention that arbitration was the proper forum and to preserve its rights on appeal if such a contention had been denied by the trial court. But since GAC did not follow that course or otherwise assert that the issues as to the validity and enforceability of the 1973 Supply Agreement should be arbitrated, rather than litigated, until after it had waived arbitration through inconsistent conduct of litigation, those cases inferentially support rather than conflict with the decision by the courts below in this case.[29]

2. An Evidentiary Hearing Was Not Required in the Circumstances.

GAC complains that it was refused an evidentiary hearing on the "waiver" issue in violation of the Federal Arbitration Act and due process (Pet. 36). Though GAC raised the issue for the first time on appeal, the New Mexico Supreme Court addressed the merits of GAC's claim and held that the hearing in the trial

[29] GAC's contention (Pet. 36-38) that the trial court should have vacated all its proceedings since entry of the April 2, 1976 injunction, by reason of this Court's decision in the first *Felter* case, is too frivolous to deserve more than a footnote. That injunction did not involve or relate to a stay of proceedings in the trial court, but only concerned a stay of proceedings in other forums. This Court's first *Felter* decision was similarly restricted, as the Court made clear in second *Felter*. See pp. 22-23, *supra*. Indeed, GAC did not object to the order entered by the trial court pursuant to the mandate in the first *Felter* case. See p. 17, *supra*. If GAC had been erroneously denied a requested stay of proceedings in the trial court by the April 2, 1976 injunction, its present contention would at least be relevant, but that did not occur.

court was "'appropriate to the nature of the case'" (Pet. App. 30a-32a), without reaching the issue of whether "GAC waived its right to a hearing by failing properly to object and alert the court to the right, if it had such right . . . ." (Pet. App. 32a).

Section 6 of the Federal Arbitration Act (9 U.S.C. §6) states that except where otherwise provided, applications under the Act are to be "made and heard in the manner . . . for the making and hearing of motions." The only exception to §6 is §4, which is inapplicable here since GAC's application to stay the trial was made under §3 of the Act.[30] "Motions may be decided wholly on the papers, and usually are," and a trial court does not abuse its discretion by so proceeding under §3. *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365-66 (2d Cir. 1965).

As set forth in the New Mexico Supreme Court's opinion, the trial court received extensive briefs from both sides on the waiver issues, both factual and legal,[31] the trial court had "virtually lived" with the case for over two years, the trial was in its second month and both sides submitted proposed findings of fact and conclusions of law (Pet. App. 32a). Moreover, GAC's acts of waiver occurred either in open court or were reflected in pleadings and other papers reposing in the court file, the contents of which were not subject to dispute. As noted in *Graig Shipping Co. v. Midland Overseas Shipping Corp.*, 259 F. Supp. 929, 931 (S.D.N.Y. 1966), it is the "objective manifestation of the record"

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[30] The two cases relied upon by GAC, *A/S Custodia v. Lessin International, Inc.*, 503 F.2d 318 (2d Cir. 1974) and *El Hoss Engineer. & Transport Co. v. American Ind. Oil Co.*, 289 F.2d 346 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961), both involved §4 of the Act which provides that "the court shall proceed summarily to trial" of issues under §4 as to the making or performance of an arbitration agreement. Neither case involved a determination of waiver by participation in judicial proceedings under §3 of the Act.

[31] In addition to the briefs, the parties submitted whatever documentary evidence they thought relevant to the waiver issue.

that is the test for waiver of arbitration through participation in judicial proceedings. GAC never tendered any witnesses or identified any additional evidence it wanted to present. See p. 18, *supra*.[32] In these circumstances, the hearing held was indeed "appropriate to the nature of the case," which is what due process requires. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See, e.g., Goss v. Lopez*, 419 U.S. 565, 578-79 (1975).

3. The New Mexico Courts Had Jurisdiction to Decide the Waiver Issue.

Section 3 of the Federal Arbitration Act expressly provides that the court in which a case is pending may grant a party's application for a stay pending arbitration, if the court is satisfied that the issue involved is referable to arbitration under a written arbitration agreement, *"providing the applicant for the stay is not in default in proceeding with such arbitration."* 9 U.S.C. §3 (emphasis added). Hence, the New Mexico Supreme Court correctly concluded (Pet. App. 12a) that §3 "clearly mandates that a court in which a case is pending, and a stay is requested for arbitration, has jurisdiction to determine whether the movant is 'in default in proceeding with such arbitration'" and that, accordingly, the trial "judge was not in error in assuming jurisdiction to decide the question of waiver." As was pointed out in *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512, 513 (D.C. Cir. 1966), in a *per curiam* opinion by a panel that included Chief Justice (then Judge) Burger, a party who "waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right . . . is necessarily 'in default in proceeding with such arbitration.'"

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[32] Even in its petition, GAC does not point to any facts which are in dispute or what evidence it would present through witnesses.

GAC urges, nonetheless, that this jurisdictional ruling by the court below "conflicts with this Court's decisions which relieve the judiciary of that burden and shift the determination [of the waiver by participation in litigation issue] to the arbitration tribunals voluntarily selected by the parties" (Pet. 39). None of the cases cited, however — *Operating Engineers v. Flair Builders Inc.*, 406 U.S. 487 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395 (1967) — either involved or referred to the determination of an issue as to whether an applicant for a stay under §3 of the Federal Arbitration Act is "in default in proceeding with such arbitration," whether by reason of waiver or otherwise, and those cases are fully consistent with the decision below.[33]

GAC also contends (Pet. 40-41) that the "courts of appeals are divided over whether a court may consider and decide that a party has waived arbitration by delaying its demand," and cites *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965), for the proposition that the "Second Circuit has taken the position that issues of waiver are for the arbitration panel." In fact, there is no such split of authority and *World Brilliance* does not conflict either with the decision below or with the decisions of other courts of appeals.

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[33] Both *Flair* and *Livingston* concerned the enforceability of arbitration clauses in collective bargaining agreements pursuant to §301 of the Labor Management Relations Act (29 U.S.C. §185). They held that claims that arbitrable grievances were barred by laches *(Flair)* or by non-compliance with grievance procedures *(Livingston)* are for the arbitrator to decide, but only if the court first determines that "the parties are subject to an agreement to arbitrate" (406 U.S. at 491) and thus "are obligated to submit the subject matter of the dispute to arbitration" (376 U.S. at 557), a situation that would not exist if arbitration had been waived by inconsistent judicial proceedings. *See, e.g., Reid Burton Const. v. Carpenters District Council*, 535 F.2d 598, 603-04 (10th Cir.), *cert. denied*, 429 U.S. 907 (1976). Neither *Flair* nor *Livingston* involved a waiver situation caused by participation in inconsistent judicial proceedings. And, while *Prima Paint* held that a claim of fraud in the inducement of the entire contract was for the arbitrator to decide under §4 of the Federal Arbitration Act, it recognized that "issues relating to the making *and performance* of the agreement to arbitrate" (388 U.S. at 404, emphasis added), including fraudulent inducement of the arbitration clause itself, are for the courts to determine. The "performance" of an arbitration clause seems clearly to embrace issues as to whether arbitration has been waived in a manner that constitutes a "default" under 9 U.S.C. §3. Insofar as they are at all relevant, therefore, those cases support the decision below. In a decision more directly in point, *Shanferoke Coal & Supply Corp. v. Westchester S. Corp.*, 293 U.S. 449, 453-54 (1935), this Court held a claim that the defendant "waived its rights under the arbitration clause by unreasonable delay in demanding arbitration" to be "without merit" for "reasons . . . sufficiently stated in the opinion of the Court of Appeals." This Court thus affirmed on the merits the ruling in *Shanferoke Coal & Supply Corp. v. Westchester S. Corp.*, 70 F.2d 297, 299 (2d Cir. 1934), that the defendant's delay was not sufficient to constitute a "default of proceeding with such arbitration," rather than holding that the issue was for the arbitrator to decide under §3 of the Federal Arbitration Act. *See also, Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir. 1942), where the Second Circuit recognized that a "waiver" constituting a "default" under §3 would result from inconsistent judicial proceedings, so as to bar a stay pending arbitration. GAC's reliance on the *Shanferoke* and *Kulukundis* cases (Pet. 41 n. 28) is, therefore, unwarranted.

World Brilliance arose under §4, rather than §3, of the Federal Arbitration Act, and the "waiver" claim that it held was for the arbitrator to decide arose not out of conduct in judicial proceedings, but simply out of delay in instituting the proceeding to compel arbitration. In a subsequent case where — as here — the claim of "waiver" was based on a party's participation in judicial proceedings, the Second Circuit decided the issue on the merits and held that arbitration had been waived. *Demsey & Associates v. S. S. Sea Star*, 461 F.2d 1009, 1017-18 (2d Cir. 1972). The relevant distinction was forcefully pointed out in *N&D Fashions, Inc. v. DHJ Industries*, 548 F.2d 722, 728 (8th Cir. 1977), which noted that " 'waiver' in the present context can have two distinct meanings," and stated that:

> First, 'waiver' can mean that the party proceeding under §3 'is . . . in default in proceeding with such arbitration,' and

so under the terms of the Arbitration Act is not entitled to a stay. This is a question for determination by the courts. *Halcon International, Inc. v. Monsanto Australia Ltd.*, 446 [sic; 446] F.2d 156, 161 (7th Cir.), *cert. denied*, 404 U.S. 949 . . . (1971); *Cornell & Co. v. Barber & Ross Co.*, 123 U.S.App.D.C. 378, 360 F.2d 512 (1966). A default occurs when a party 'actively participates in a lawsuit or takes other action inconsistent with' the right to arbitration. *Cornell & Co. v. Barber & Ross Co., supra,* 360 F.2d at 513. . . .

Alternatively, 'waiver' can be used in the sense of 'laches' or 'estoppel.' In this sense, waiver applies to bar arbitration when the process would be inequitable to one party because relevant evidence has been lost due to the delay of the other. *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568, 571 (2d Cir. 1968). Waiver in this 'laches' sense is generally an issue for the arbitrator, . . .

As the Seventh Circuit noted in the *Halcon International* case cited in the above quotation, *World Brilliance* involved "'[w]aiver' in the laches or estoppel sense, rather than in the default sense or participating in judicial proceedings . . ." 446 F.2d at 161. *See also, Weight Watch. of Quebec Ltd. v. Weight W. Int., Inc.*, 398 F. Supp. 1057, 1058-59 (E.D.N.Y. 1975); *In re Tsakalotos Navigation Corp.*, 259 F.Supp. 210, 212-13 (S.D.N.Y. 1966). In every case to our knowledge in which arbitration is claimed to have been waived by conduct in judicial proceedings, rather than by extrajudicial delay in demanding arbitration, the courts have determined the claim on the merits.[34]

[34] In addition to the decisions cited herein, *see also, e.g.*, those cited in n. 2 to the opinion of the New Mexico Supreme Court and accompanying text (Pet. App. 12a). The cases cited in n. 1 of that opinion (Pet. App. 11a) involved delay in invoking arbitration unrelated to participation in inconsistent judicial proceedings.

Consequently, the decision by the New Mexico courts that they had jurisdiction to decide the issue in this case is consistent with all relevant authority as well as with the express language of §3 of the Federal Arbitration Act, and the issue is not one which deserves further review by this Court.

4. The State Antitrust Issues, and Other Issues Intertwined Therewith, Are Not Arbitrable Under the Federal Arbitration Act.

The Federal courts have consistently held that Federal antitrust issues are not arbitrable under the Federal Arbitration Act.[35] The New York courts have held that State antitrust issues are not arbitrable under the New York arbitration act.[36] One Federal court has held that State antitrust issues are not arbitrable under the Federal Arbitration Act.[37] This appears to be the second case in the 54 years since the Federal Arbitration Act was enacted in 1925 (43 Stat. 883) in which an issue has arisen as to whether State antitrust issues are arbitrable under that Act. Both of the courts below held that the issues as to violation by GAC of New Mexico's antitrust laws are not arbitrable under the Federal Arbitration Act, and that the other issues in dispute are so intertwined with those antitrust issues that arbitration of those issues also is inappropriate. See Pet. App. at 34a-40a. This holding constituted an independent ground

[35] *E.g., Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 825-28 (2d Cir. 1968); *A.&E. Plastik Pak Co. v. Monsanto Company*, 396 F.2d 710 (9th Cir. 1968).

[36] *Aimcee Wholesale Corp. v. Tomar Products, Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223 (1968). The Federal Arbitration Act (9 U.S.C. §1 *et seq.*) is patterned after the New York act. *See, Shanferoke Coal & Supply Corp. v. Westchester S. Corp., supra,* 70 F.2d at 298.

[37] *Fox v. Merrill Lynch & Co., Inc.*, 453 F. Supp. 561 (S.D.N.Y. 1978).

for the denial of a stay pending arbitration which is, in itself, sufficient to support that denial regardless of the correctness of the rulings below on the other issues.

The fact that this appears to be only the second case in which the issue has arisen in over 54 years is sufficient in itself to demonstrate that the ruling below does not have the kind of general importance which might warrant review by this Court. Since the other case reached the same result, the possibility of a conflict in decisions does not exist. And, the analogous authority afforded by the decisions in regard to arbitration of Federal antitrust issues and to arbitration of State antitrust issues under the New York arbitration act, as well as other decisions cited by the New Mexico Supreme Court (Pet. App. 34a-40a), provide persuasive support for the decision below.

GAC does not question the validity of those analogous decisions, but contends in effect that they are not analogous. It asserts (Pet. 42) that it is "one thing to reconcile conflicting federal statutes by exempting federal antitrust issues from the federal arbitration statute; it is quite another to reconcile conflicting federal and state statutory policies by giving the state policy precedence", and contends that the "New Mexico Supreme Court has, in effect, held the Federal Arbitration Act to be preempted by the New Mexico Antitrust Act."

That argument is entirely mistaken. The decisions holding Federal antitrust issues inarbitrable are not based upon some express or implied exemption in those antitrust laws from the provisions of the Federal Arbitration Act. They are based, rather, upon the fact that antitrust issues are "of a character inappropriate for enforcement by arbitration" and that the Congress thus did not intend, in the Federal Arbitration Act, to subject them to arbitration. *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978) quoting

American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821, 825 (2d Cir. 1968). The reasons for that conclusion, as initially expressed in *American Safety Equipment Corp.* and summarized in *Cobb v. Lewis*, 488 F.2d 41,47 (5th Cir. 1974) and in *Applied Digital Tech.*, 576 F.2d at 117, are as follows:

> The first is the broad range of public interests affected by private antitrust claims. The Court [in *American Safety Equipment Corp., supra*] recognized that '[a] claim under the antitrust laws is not merely a private matter', because private antitrust actions are an integral part of the effort of the antitrust laws 'to promote the national interest in a competitive economy.' 391 F.2d at 826. The Second Circuit noted that it is doubtful Congress could have 'intended such claims to be resolved elsewhere than in the courts'. *Id.*, at 827. The second is the complexity of the issues and the extensiveness and diversity of the evidence antitrust claims usually involve. These render antitrust claims 'far better suited to judicial than to arbitration procedures.' *Id.* The third is the questionable propriety of entrusting the decision of antitrust issues to commercial arbitrators, who 'are frequently men drawn for their business expertise', when 'it is the business community generally that is regulated by the antitrust laws'.

The New York Court of Appeals relied upon these same considerations, and others, in concluding that the New York arbitration statute was not intended to require arbitration of State antitrust issues. *Aimcee Wholesale Corp. v. Tomar Products, Inc., supra,* 237 N.E.2d at 224-27. And, the New Mexico Supreme Court concluded that those considerations are equally applicable to issues arising under the New Mexico antitrust laws, which reflect the same public policy as do the

Federal antitrust laws of "promoting the national interest in a competitive economy." Pet. App. 36a.[38] In short, this case does not involve a preemption or evasion of the Federal Arbitration Act by inconsistent State laws, but an interpretation of that Act as not requiring arbitration of State antitrust issues for the same reasons that the Act concededly does not require arbitration of Federal antitrust issues.

The New Mexico Supreme Court held (Pet. App. 40a) that the trial court "did not abuse its discretion in holding that all the issues in this case are so intertwined with the antitrust issues that no issues are arbitrable", because:

> The standard of review is whether the trial court abused its discretion. *Applied Digital, supra; A. & E. Plastik Pak Co., Inc. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968). A review of the record in this case clearly indicates that the issues are 'complicated, and the evidence extensive and diverse. . . .' *American Safety Equipment*, 391 F.2d at 827. It would not be 'easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues.' *Cobb*, 488 F.2d at 50.

The New Mexico Court thus applied the standards established in decisions by the Federal courts in deciding this issue, and concluded after "a review of the record" that the trial court had not abused its discretion.

GAC does not question the standards thus applied by the New Mexico Supreme Court, but seems to contend (Pet. 43-44) that the Court "declined to engage in this practical analysis" as to

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[38] As noted by the New Mexico Supreme Court (Pet. App. 36a), it is federal policy, clearly expressed by the Congress, to promote and finance state antitrust enforcement.

whether litigation or arbitration should proceed first. But, since the trial court and the New Mexico Supreme Court, with their extensive experience with the issues and facts involved in the case, concluded that none of the other issues could practicably be separated from the antitrust issues, there was no need to decide whether arbitration or litigation should proceed first. The lower courts were well aware that the facts underlying UNC's antitrust claims were also common to its claims of fraud, breach of fiduciary duties, economic coercion and others. In circumstances where antitrust issues and other issues are "inextricably intertwined," it is obviously proper for a court to proceed with the trial and thus to deny a stay pending arbitration. *See, e.g., Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d at 117-19; *Cobb v. Lewis*, 488 F.2d at 49-50; *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10. 26-27 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al,*
Defendants.

AMENDED SANCTIONS ORDER AND DEFAULT JUDGMENT

This matter coming before the Court upon motions for sanctions and for the granting and entry of default judgments against defendant, General Atomic Company, for its failure to comply with discovery laws and orders of the Court, a motion for an evidentiary hearing upon part of the motions relating to requested sanctions, responses to the aforesaid motions, supporting affidavits and documents, and argument and authorities made and submitted by the various parties; the Court having given due study and consideration to all of the foregoing, and to the whole record and history in this litigation, including all hearings conducted on discovery questions throughout the period from December 31, 1975, to the present; the Court having further reviewed all relevant pleadings, interrogatories and answers thereto, and other relevant and credible documents and materials in this case, as well as pleadings in other related court cases; based upon all of the foregoing, this Court now concludes that the defendant, General Atomic Company, has followed a

conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affiliates, including defendant, GAC, participated, from an as yet undetermined time, but for not less than from and during 1972 into 1975; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time, leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time. To require the other parties to this case to proceed further upon the trial on the merits at this time, other than upon a consideration of damages, disadvantaged as they are by the lack of discovery and GAC's failure to provide discovery, would result in a grave injustice unto all parties to this action other than GAC and a cynical denial of equal protection of the law unto them; the factual basis for imposing sanctions under Rule 37 appears from and is documented by the "Recitals" which are hereinafter set forth, which manifestly appear from the face of the record herein, without any need or requirement for an evidentiary hearing or other form of additional delay in giving effect to Rule 37, to-wit:

RECITALS

(1) On December 31, 1975, United Nuclear Corporation, plaintiff herein, by motion and leave of the Court, filed its First Set of Interrogatories to General Atomic Company in this action. Those Interrogatories were identical in scope to UNC'S interrogatories filed in Cause No. 50044, Santa Fe County District Court. The definition section of those interrogatories filed herein, as well as certain questions, specifically requested information from the constituent partners of GAC, Gulf Oil Corporation and Scallop Nuclear, Inc. Those definitions were not objected to within the time allowed by Rule 33 of the New Mexico Rules of Civil Procedure, and, indeed, were never objected to by GAC.

(2) In UNC's First Set of Interrogatories, UNC asked, *inter alia*, that GAC:

> "32. Identify all agreements and all past, pending or contemplated negotiations of the partnership or the partners, directly or indirectly pertaining to the processing of uranium-bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form, and the marketing and sale of all such uranium-bearing products.
>
> "34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products."

Such information was relevant and material to the repeated allegations in UNC's Complaint that the 1973 Uranium Supply Agreement and 1974 Uranium Concentrates Agreement were executed in violation of §§49-1-1 and 49-1-2 NMSA 1953 of the New Mexico antitrust statutes.

As to UNC's First Set of Interrogatories, GAC requested and received an extension of time in which to respond.

(3) GAC neither answered nor objected to the Interrogatories within the time allowed, and UNC failed its First Application for Default Judgment on March 10, 1976. On March 12, 1976, the parties entered into an Agreement signed by counsel for UNC, GAC and Gulf Oil Corporation in which UNC agreed to withdraw its Application for Default Judgment, and GAC agreed to "answer in good faith all interrogatories to Defendant presently pending in this action," and to produce documents. No objection was made to the fact that information concerning Gulf Oil Corporation was requested, or that Gulf Oil Corporation was obligated by the terms of this Agreement to produce relevant documents. The agreement between the parties expressly referred to "Gulf Correspondence" as one category of documents which GAC agreed to provide. Said Agreement was entered into with Gulf Oil's knowledge and approval, its attorney having executed same.

(4) The documents generated by the cartel's Secretariat, telexes by the Secretariat, documents of the Canadian producers' group, as well as internal Gulf documents concerning the cartel were, at the time of the March 12, 1976 Agreement, subject to UNC's Interrogatories and the Agreement to produce. At that time, most or all of these documents were in the files and custody of Gulf Minerals Canada, Limited, a wholly owned subsidiary of Gulf Oil Corporation, and included within the scope of UNC's First Interrogatories, in Canada, and no law of the United States or Canada prohibited their production.

(5) Rather than answering the Interrogatories fully, or producing the Gulf cartel documents which was within the ambit and requirement to furnish of its March 12, 1976 Agreement,

GAC instead filed on April 2, 1976 wholly inadequate and evasive answers to the Interrogatories. In response to UNC's interrogatory No. 69 (first set) which asked GAC when the business records of Gulf and Scallop would be produced for inspection and copying, GAC, under oath answered that it would produce those records for inspection and copying on June 20, 1976.

(6) In response to GAC's Motion to Stay Further Proceedings, this Court held on April 30, 1976, that the "parties are bound by their agreements," and that GAC was obligated to provide full discovery as contemplated by the March 12, 1976 Agreement.

(7) From March 12, 1976, forward, GAC neither identified nor produced cartel documents or information in the possession of Gulf Oil Corporation and its subsidiaries, despite its Agreement to do so, and the Order of the Court on April 30, 1976, that it comply with that Agreement.

(8) On August 6, 1976, UNC filed its Second Motion for Default Judgment for GAC's failure to answer UNC's Interrogatories propounded on December 31, 1975, and its failure to abide by the March 12, 1976 Agreement and the Court's April 30, 1976 Order. In response to that Motion, GAC represented to the Court that "complete and full effort has been made to cooperate with the demands of Plaintiffs in document discovery and such attempts have gone fully beyond any good faith requirements by the Rules of Civil Procedure or agreement of the parties."

(9) From December 31, 1975, the date UNC's Interrogatories were filed in this case, through September 23, 1976, the date the Canadian government passed the Uranium Security Regulations, GAC never informed this Court or UNC about the existence of the international uranium cartel; Gulf Oil

Corporation's participation therein; or about the Gulf documents relating thereto in Canada.

(10) Despite its agreement and this Court's Order to produce Gulf documents, GAC willfully, intentionally and in bad faith covered up the fact of Gulf Oil Corporation's participation in an international uranium cartel from at least 1972 into 1975, which include years in which it was in a joint venture with UNC, viz., Gulf United Fuels Corporation (GUNF). GAC thereby deliberately concealed the existence of evidence which it knew to be highly relevant to the antitrust issues pleaded in UNC's Complaint and stressed by counsel throughout the discovery period. This intentional and willful action was a violation of UNC's discovery rights and the Orders of this Court.

(11) The Court repeatedly has warned that all parties are obligated to make full disclosure in good faith to discovery requests. On several occasions since the beginning of litigation, the Court has told all parties that it expected a good faith, non-evasive and full compliance with discovery. The Court also warned on November 30, 1976, and again on March 3, 1977, that it would apply sanctions provided under Rule 37 of the New Mexico Rules of Civil Procedure for *any party's failure to make discovery in good faith.*

(12) UNC's Second Set of Interrogatories, the discovery subject matter of which also was clearly within the ambit and requirement of its First Set of Interrogatories filed on December 31, 1975, were served on August 16, 1977. A good faith, non-evasive response by GAC to said First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories. The Second Set of Interrogatories requested full disclosure and commitment to a set of specific facts by GAC concerning its and Gulf's cartel activities, and requested identification of all documents relevant to each interrogatory.

(13) UNC also filed a Motion to Produce all documents indentified in GAC's Answers to Interrogatories on August 16, 1977.

(14) GAC objected to UNC's Second Interrogatories on August 23, 1977, most of which objections were overruled. On September 9, 1977, this Court held a hearing on additional objections by GAC to UNC's Second Set of Interrogatories, most of which were also overruled. GAC was ordered to answer by September 20, 1977. In a hearing before the Court on September 20, 1977, counsel for GAC requested an extension of time in which to answer said Interrogatories on the ground that the extension would enable counsel to provide "full and good faith" answers to the Interrogatories. The extension was granted, and on September 26, 1977, GAC filed its first Answers to UNC's Second Set of Interrogatories.

(15) GAC's first Answers consisted in a large measure of a "do-it-yourself" kit, merely directing UNC to deposition pages from which it was supposed to discover the answers to its interrogatories. This Court, on October 11, 1977, held that GAC's Answers were "defective, incomplete, inadequate and unacceptable." GAC was again ordered to answer the Interrogatories, and to give full and good faith discovery.

(16) On October 20, 1977, GAC filed its Second Answers to UNC's Interrogatories. Those "Answers" excluded all information contained in the Gulf documents in Canada, and did not identify the documents as GAC had been ordered to do on October 11, 1977.

(17) On December 9, 1977, Indiana and Michigan, Detroit Edison and UNC joined in moving to compel further answers to UNC's Second Set of Interrogatories.

(18) After consideration of all briefs filed by GAC and others, this Court held that the answers made and filed by GAC to date had not complied with the Court's orders to make complete, good faith, and non-evasive answers to UNC's Second Set of Interrogatories. The Court therefore again ordered GAC "completely, in good faith, and without evasion" to answer each of the interrogatories enumerated in Finding No. 3 of the Court's December 27, 1977, Order. The Court also specifically gave notice in its December 27, 1977, Order that if GAC failed or refused to comply with that Order of the Court, any aggrieved party could apply to the Court for appropriate relief under Rule 37.

(19) GAC obtained from the Court two extensions of time in which to answer UNC's Interrogatories, and filed its Second Supplemental Answers on February 1, 1978. The Court has examined the answers so filed and finds them unresponsive and evasive to the questions asked, and mere legal argument in many of such answers. The series of Interrogatory Answers filed by GAC, after six months shows disdain for this Court's Orders that all parties make good faith discovery. Those answers so filed, coupled with what had gone before them, constitute, in effect, obstruction of justice, and demonstrate a willful, deliberate and flagrant scheme of delay, resistance, obfuscation and evasion in discovery matters.

(20) The latest answers filed by GAC also violate the express terms of the Court's Order of October 11, 1977, wherein the Court held that the deposing party is entitled to obtain from the deponent party a commitment to a set of facts, posture or position on the subject matter of the Interrogatory. Rather than committing to a set of facts, GAC instead simply has stated that various cartel documents cited by I & M, which GAC had failed to mention in its Second Answers, "purport to" reflect certain events. GAC steadfastly has refused and refuses to admit that

such events took place, or to state the true facts concerning the cartel, and Gulf's participation in it.

(21) By reason of the entire history relating to the manner of fulfilling its discovery requirements since the filing of UNC's First Set of Interrogatories on December 31, 1975, the Court concludes that it is hopeless to expect that GAC will in "good faith and without evasion" comply with the discovery requirements of the New Mexico Rules of Civil Procedure or this Court's Orders. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer UNC's Second Set of Interrogatories. UNC and the other parties to this suit have been irreparably prejudiced by this failure. Any party to any civil action is entitled to have and rely upon good faith discovery in the preparation and presentation of its case in chief and not at the end of the trial on its merits when such discovery is of little or no value to such party. If there can be any sanctions for non-discovery and if Rule 37 has any meaning, a party unlawfully deprived of discovery is entitled to those sanctions early and as a part of its case in chief and not at the end of the trial on its merits, whereby the innocent victim party would suffer the jeopardy of a motion for dismissal under Rule 41 (or for a directed verdict) without having the discovery to or sanctions to counter such a motion. It is now too late to expect answers or discovery in time to serve the purposes of the discovery rules and the Rules of Civil Procedure. This Court, in the interests of justice and fairness to all parties, and in order to enforce equality within the judicial process, must, at this time, apply appropriate sanctions for non-discovery specifically provided for in Rule 37 of the New Mexico Rules of Civil Procedure.

(22) GAC is under a duty to produce all documents to UNC which are or may be relevant to any of the Interrogatories asked in UNC's First Set of Interrogatories and even more particularly delineated and asked in UNC's Second Set of Interrogatories,

including but not limited to any documents relevant under questions 30 through 34 of the First Set of Interrogatories.

(23) GAC has represented to the Court and to all parties on several occasions that UNC had all documents which were relevant to the cartel or other issues raised in UNC's Interrogatories.

(23-A) GAC, as well as all parties to this action has been under a continuing obligation to update answers to interrogatories and to continue to produce documents in this litigation as their existence became known. In early January, 1978, GAC produced additional cartel documents to the U.S. Grand Jury in Washington, D.C. and to Westinghouse Electric Corporation. GAC, in bad faith, failed to reveal the existence of these documents to this Court or to the parties to this case, until after UNC had learned of their existence from a third party and made a demand upon GAC.

(24) The facts hereinabove set forth display a pattern and practice of GAC and Gulf to conceal documentary evidence of Gulf's and GAC's anti-trust activities and to subvert the discovery processes of this Court. GAC has deliberately failed to produce highly relevant documentary evidence. GAC has deliberately failed to inform this Court and the other parties, in a reasonably timely manner, of actions taken by another court in another jurisdiction which had a direct bearing upon the existence and materiality of such evidence. On August 10, 1977, Judge Snyder entered an order de-privileging, making public and holding outside the scope of the attorney-client privilege, approximately 41 of the 84 documents turned over to him by Gulf Oil Corporation for inspection in the Federal District Court in Pittsburgh, Pennsylvania. Despite the fact that the same law firm which represents GAC in this action represented Gulf before Judge Snyder in the Federal case in Pittsburgh, this matter

inexplicably was not brought to this Court's attention promptly by GAC. GAC never accurately disclosed to the Court nor to UNC the existence of all 84 of the documents turned over by Gulf to Judge Snyder in the Westinghouse litigation. The existence of most of those documents was not disclosed to the Court or to UNC until over one year after they were called for by UNC's First Set of Interrogatories and the agreement of the parties on March 12, 1976. The existence of some of the Snyder documents was not disclosed to the Court or to UNC until after Judge Snyder held them to be public and outside the scope of the attorney-client privilege. It was not until after UNC brought the matter of the Snyder order up in open court on October 7, 1977 and this Court's subsequent order that GAC first identified and turned over to UNC some of the Snyder documents. The failure to reveal the existence and identity of all of the Snyder documents in a timely manner in this case, was a deliberate attempt to further conceal the existence and identity of that evidence and avoid turning relevant documents over to parties to this litigation in compliance with lawful discovery demands.

Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith.

(25) Within the ambit and requirement of its First Set of Interrogatories, filed on December 31, 1975, UNC's Second Set of Interrogatories with even more particularity and specificity ask, in almost every question, for the separate identification of documents relating to the subject matter of each separate interrogatory, and production of all documents so identified. In GAC's First Answers to such Second Set of Interrogatories, filed on September 26, 1977, no identification of documents was made and virtually no documents were produced, despite UNC's clear request for such identification and production.

(26) In its October 11, 1977, Order, the Court required and ordered GAC to "separately, clearly and definitively identify all documents, where such identification is requested, whether such documents be housed only in Canada, only in the United States, in both countries or elsewhere."

(27) Rather than identifying the documents, GAC instead wrote a Canadian Minister asking if it could get permission to reveal "a summary of contents" of the documents. As this Court held on November 18, 1977, the Court's October 11, 1977, Order did not specify that a "summary of contents" be stated as part of the identification of documents. The Court's Order of October 11, 1977, to identify documents was not performed or complied with, but, rather, it was sought to be avoided, and willfully and deliberately violated by GAC.

(28) GAC next wrote a letter to a Canadian Minister who has been determined by the courts of Canada to have no authority to interpret or deal with the Uranium Security Regulations. Nevertheless, in full knowledge that the Minister to whom it wrote had no legal authority to interpret the Regulations, GAC asked and waited for his interpretation as to whether he thought it could identify documents in accordance with the Court's October 11 and November 18, 1977, Orders. A letter was received from the Canadian Minister saying he had no authority to interpret the Regulations, but that in his personal opinion, the Regulations did not allow identification.

(29) The Canadian Security Regulations on their face prohibit only revealing "contents or information contained in" cartel documents in Canada. A reasonable interpretation of that language, and this Court so reads it, would mean that simple identification, giving the date of the document, the author, addresses, and general subject matter, would not violate the law of Canada because the "contents or information" contained in the document itself would not be revealed.

(30) Nevertheless, GAC has refused to comply with the Order of this Court also concerning identification of the Canadian documents. As of this date, GAC has not identified the documents in Canada for the benefit of the Court and the parties nor has it even stated or disclosed the number of documents housed in Canada, thereby following its established practice of concealing, rather than revealing, pertinent information.

(31) The Court's October 11, 1977, Order also required GAC to "take affirmative action and to exert all lawful effort reasonable and possible to bring about the production" of documents housed in Canada. In order to be held to have been acting in good faith, the Court said that GAC should "seek diligently dispensation from those Canadian laws so that it could lawfully produce documents to which such laws may pertain."

(32) GAC's response to this requirement that it take "all lawful effort reasonable and possible" (other than so late as February 22, 1978, to offer to take other counsel and the Court to Canada to talk to Canadian officials about production of documents, in person), was to write a simple letter to the Canadian Minister of Energy, Mines and Resources, asking if he would consent to release the documents in question. The Canadian government's answer was "no."

(33) Actions taken by parties in similar cases in dealing with foreign governments which have imposed secrecy laws are instructive as to the standard of "good faith" to be used in dealing with foreign governments to secure the release of documents. In *In Re Ampicillin Litigation*, in which Judge Sirica ordered that findings of fact be made against a party which refused to produce documents and because of a British secrecy law, the Defendant undertook diligent and long-term negotiations with the British government which ultimately resulted in the documents being released in their entirety.

(34) Similarly, in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), "good faith" in dealing with a foreign government over the release of documents was found only after the petitioner had negotiated for two years with the Swiss government, which resulted in the release of over 190,000 documents. In addition, petitioner there persuaded the Swiss government to allow a neutral third party agreed upon by petitioner and the Swiss government to inspect the documents and obtain the release of some of them.

(35) GAC's writing a simple letter to a Canadian Minister who has been declared by law to have no authority to interpret Canadian Security Regulations or to grant a dispensation therefrom does not constitute a "good faith" effort to secure the release of documents in Canada or the information contained in them. Neither GAC, nor Gulf Minerals Canada, Ltd., nor Gulf Oil Corporation has entered into any negotiations with the Canadian government, or taken any further action beyond writing a simple letter insofar as made known to this Court. Such action does not constitute the "good faith" and "diligent" effort to secure the release of the documents required by the Court's October 11, 1977, Order. In fact, GAC's actions demonstrate its actual intent to conceal the documentary evidence concerning the cartel rather than to produce it in good faith to the parties to this litigation and the Court.

(36) UNC filed a Motion on November 4, 1977, asking that this Court find all facts provable from the documents stored in Canada against GAC. The Court authorized the presentation of evidence at an evidentiary hearing.

(37) At the aforesaid evidentiary hearing, GAC put on evidence through an attorney with Howrey and Simon, who testified about the efforts made by that law firm to identify

documents in answer to UNC's Interrogatories. GAC put on absolutely no evidence about how the documents came to be stored in Canada, or why they were there.

(38) UNC moved the admission at the evidentiary hearing of four separate statements by Mr. L. T. Gregg in his *Westinghouse (Richmond)* deposition. The admissibility of this deposition testimony was stipulated to by counsel for GAC on the record.

(39) Mr. Gregg's deposition testimony established that Gulf followed a deliberate policy of housing the cartel documents in Canada, rather than in the United States. His testimony also established that to the extent documents were in the United States, it was understood that they were to be stored in the offices of the Pittsburg law department, where they could be shielded by a claim of attorney-client privilege.

(40) It was on this uncontradicted factual record that the Court made its findings on November 18, 1977, that Gulf followed a conscious and deliberate policy of housing the cartel documents in Canada. That finding is reiterated here. Gulf's action in regard to storing cartel documents in Canada amounts to deliberately courting or seeking legal impediments to the production of the records.

(41) UNC has complied with GAC's discovery requests fully and in good faith insofar as anything in that regard has been brought to the attention of or is known to the Court. No representation to the contrary has been made by any party hereto.

(42) All other parties to this litigation except GAC have also made good faith efforts at discovery, and have both produced documents and answered interrogatories in good faith.

(43) Based on the deposition testimony given by L. T. Gregg in this case, it is apparent that there are documents which presently exist in the files of Gulf Minerals Canada, Ltd. (a wholly owned subsidiary of Gulf) which are highly relevant to the antitrust, fraud and breach of fiduciary duty allegations by UNC in its Complaint and in its defense to GAC's Counterclaim. GAC has produced to the parties to this litigation only a small part of those documents. GAC's refusal to produce documents housed in Canada since December 31, 1975, was not based on inability to comply with production requests, but rather on bad faith refusal to produce.

(44) The cartel documents and records were clearly within the ambit and requirement of a good faith compliance with the initial discovery demands made herein by UNC in its First Set of Interrogatories on December 31, 1975, and numerous subsequent demands made prior to September 23, 1976, the effective date of the Canadian Uranium Information Security Regulations.

(45) Defendant, GAC, was in default and violation of its obligation to produce cartel documents from Canada and elsewhere in this case, prior to and long before September 23, 1976, wherein and whereby a good faith compliance with lawful discovery demands, their agreements and the Orders of this Court, would have produced in this case all of such cartel documents before there was a Canadian law or prohibition against so doing.

(46) The findings and recitals in the Court's Order of November 18, 1977, relating to discovery are adopted and incorporated herein by reference as a part of the "Recitals" of this Order. A copy of said Order of November 18, 1977, is hereunto attached.

(47) In this situation, GAC's failure to produce in good faith and failure to answer interrogatories in good faith has deprived UNC of a full and fair opportunity to cross-examine GAC's witnesses to defend against GAC's counterclaims for specific performance and damages; to rebut GAC's defenses to their claims; or on its case in chief to properly present United Nuclear's antitrust claims pleaded in the Complaint. Similarily, GAC's failure in discovery has deprived this Court of evidence which is indispensable to a proper and just adjudication of the issues in this case.

(48) The Court concludes that the only just and proper way to protect and secure due process rights to a fair trial for UNC, and the defendant, I & M is to impose sanctions under Rule 37 of the New Mexico Rules of Civil Procedure.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

A. The Court hereby adopts and imposes the following Rule 37 sanctions against the defendant, GAC, and in favor of the other parties to this case, adopted and found as fact because of the failure of defendant, GAC to comply with discovery Rules and the Orders of this Court, which failure the Court finds to be willful and deliberate, to-wit:

1. Gulf Oil Corporation (Gulf), Gulf General Atomic (GGA), Gulf Minerals Canada, Ltd. (GMCL), General Atomic Company (GAC), and Gulf Minerals Resources Company (GMRC), severally and as co-conspirators with each other, and with other members and participants therein, participated in the formation and operation of an international conspiracy and cartel of uranium producers ("the cartel"), from at least 1972 to 1975. The purpose and effect of the cartel was to limit the supply, control production, allocate markets and fix the price of uranium.

2. The Canadian Government encouraged, but in no way required or mandated the membership of GMCL in the cartel. Neither Gulf, GGA, GMCL, GAC, nor GMRC, nor any of them, was ever compelled by the Canadian Government to participate in the cartel. GMCL would not have had the authority to join and participate in the cartel without authorization from responsible officers of Gulf, who were members of the so called "Executive", and who gave such authorization and sanction to the participation, actions and dealings of GMCL in the cartel.

3. GMCL is and was a wholly owned subsidiary of Gulf, and after GMCL joined the cartel, its members and members of the cartel Operating Committee had a number of meetings at various locales around the globe. At such meetings, the members of the cartel, including GMCL, agreed: (a) not to sell to middlemen, wherever located, or, alternatively, to do so only on highly discriminatory terms. Such middlemen included and were understood by both GMCL and Gulf to include both Westinghouse and Gulf United Nuclear Fuels Corporation (GUNF), and (b) to divide world markets (including the USA) and to fix the price of uranium. GUNF at all times was a corporation wholly owned by Gulf and UNC as a joint venture between them, and with Gulf holding majority ownership and management control thereof.

UNC and Gulf were under a fiduciary relationship, one to the other in their aforesaid joint venture creation, ownership and operation of GUNF. As fiduciaries, such owed to the other full disclosure of any information affecting or that might affect the operation and success of GUNF.

4. Said cartel agreements were carried out effectively; the world market price of uranium was fixed at artificially high levels by the cartel, and GUNF, a middleman, was greatly handicapped and damaged in its efforts to procure uranium.

5. Pursuant to an agreement with the cartel, Gulf, individually and with and through its divisions, affiliates and subsidiaries, including but not limited to GMCL, restricted and withheld production of uranium at Mount Taylor in New Mexico in order to limit the supply and control production of uranium in New Mexico, with the independent specific intent to monopolize New Mexico uranium reserves. The restriction of Mount Taylor production was and is a part and parcel of the aforesaid conspiracy by Gulf and by the cartel. Such restriction of production was a combination and attempt to monopolize as well as actual monopolization of New Mexico uranium reserves, and has constituted and constitutes a substantial adverse effect on New Mexico commerce.

6. Gulf and GAC executed the 1973 Uranium Supply Agreement and the 1974 Uranium Concentrates Agreement with United Nuclear Corporation (UNC) with the intent and as a part of an attempt, combination and conspiracy, engaged in by Gulf, GAC, their affiliates, divisions and subsidiaries, to monopolize New Mexico uranium reserves, and with the purpose and effect, in furtherance of the cartel conspiracy, to limit supply and control production and competition with the cartel from a New Mexico uranium producer. Both of the aforesaid contracts had and have as their object by Gulf and GAC, and do in fact operate, to restrict trade or commerce of a product of the mines of New Mexico, and have constituted and constitute a substantial adverse effect on New Mexico commerce.

7. Gulf and GAC executed the aforesaid agreements as a part of the attempt, combination and conspiracy engaged in by them, their affiliates and subsidiaries and the cartel to monopolize and the actual monopolization of New Mexico uranium reserves.

8. Gulf and GAC knew and intended that the cartel and its actions would and did in fact substantially raise the price of uranium in the United States of America domestic market, which did substantially and adversely affect New Mexico commerce.

9. Pursuant to a policy of secrecy and the cartel's directions, rules or requirements concerning secrecy, neither did Gulf, nor GAC, nor anyone acting for them, ever inform UNC or GUNF about their aforesaid participation in or the actions of the cartel, at anytime before the execution of or negotiations concerning the aforesaid 1973 and 1974 agreements. Gulf and GAC thereby breached any fiduciary duty it may have owed in the premises to UNC or to GUNF, or to both.

10. Pursuant to the cartel's express inclusion of the United States market and United States buyers in its price fixing scheme, Gulf, GMCL and GGA quoted uranium to United States utilities at cartel prices, and to GUNF at prices above cartel prices, with specific and predatory intent of injuring GUNF and UNC, thereby breaching any fiduciary duty in the premises owed to UNC and committing a predatory act against GUNF.

11. Motivated by inside knowledge of the cartel's existence, policies and actions and its plan to keep UNC's uranium locked up and out of competition with the cartel, Gulf refused to supply uranium to GUNF as it had led

UNC and GUNF to believe it would do and refused to allow GUNF to purchase uranium on the open market, thereby breaching any fiduciary duty it may have owed to UNC.

12. The cartel viewed middlemen as serious competitors, and discriminated in price against them in order to eliminate them as competitors. Gulf Oil Corporation and General Atomic Company executed the 1973 and 1974 Uranium Supply Agreements with the purpose and effect of eliminating middlemen as competitors by keeping material off the market which they might purchase.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

A. Judgment by default, except upon the issues of damages, be and it hereby is entered and granted:

1. Unto United Nuclear Corporation upon its Complaint against General Atomic Company, and

2. Unto Indiana & Michigan Electric Company upon its Crossclaim against General Atomic Company.

B. The defenses of General Atomic Company to the Complaint of United Nuclear Corporation and to the Crossclaim of Indiana & Michigan Electric Company and its Counterclaim against United Nuclear Corporation and its Crossclaim against Indiana & Michigan Electric Company, be and they all hereby are stricken.

IT IS FURTHER ORDERED that the trial of this case on its merits continue and proceed upon determination of damages only, and such other matters as may now be appropriate in view of the granting of default judgments herein.

IT IS FURTHER ORDERED that the Court shall and hereby does reserve the prerogative to make and enter herein such other, further, additional or different findings, orders or judgments, and to do such acts and conduct such proceedings as may be necessary to give full effect to the foregoing Sanctions Order and Default Judgments and to enforce justice between the parties hereto.

/s/ EDWIN L. FELTER
District Judge

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY,
a partnership composed of
Gulf Oil Corporation and
Scallop Nuclear Inc.,
Defendant.

ANSWER TO FIRST AMENDED COMPLAINT AND DEFENDANT'S COUNTERCLAIM

General Atomic Company, without waiving its objections to the Court's jurisdiction over its person, for its Answer as to all matters in which arbitration is not being sought by Defendant and as to all issues which the Court may deem unarbitrable, states and alleges as a[n]:

* * * * * *

EIGHTH DEFENSE

Some of the issues in this case are subject to arbitration pursuant to Article XVII of the Uranium Supply Agreement of 1973 (Exhibit 5 to the Complaint). In addition, United is bound by the arbitration provisions of the Duke contract and the two Commonwealth Edison contracts. Commonwealth Edison has demanded arbitration of certain issues pursuant to the

arbitration provision of the La Salle Contract. Commonwealth Edison may demand arbitration pursuant to the provisions of the Dresden Contract. Duke has demanded arbitration of certain issues pursuant to the arbitration provision of the Duke Contract. United's obligations to General Atomic may be affected by the resolution of the issues with respect to which Duke and Commonwealth Edison have demanded and may demand arbitration. General Atomic is currently opposing arbitration with both Commonwealth Edison and Duke. United is a party to Commonwealth Edison's arbitration demand and is also opposing that arbitration. General Atomic demands arbitration of only those issues which General Atomic is ultimately required to arbitrate with Duke and Commonwealth Edison pursuant to the above contracts, and which also can be arbitrated jointly among United, General Atomic and the respective utility.

Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement.

To the extent possible, General Atomic Company intends to conduct the arbitration of the issues demanded above jointly with the arbitration of the same issues between the respective power companies and itself.

* * * * * *

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General Atomic Company

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-190

GENERAL ATOMIC COMPANY,

Petitioner,

—against—

UNITED NUCLEAR CORPORATION and INDIANA & MICHIGAN ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION

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September 6, 1979

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION

General Atomic Company's ("GAC") petition seeks to review the judgment of the Supreme Court of New Mexico, entered May 7, 1979, affirming a "partial final judgment" entered by the District Court for the First Judicial District, Santa Fe County, New Mexico. That judgment denied GAC's motion to stay, pending arbitration, the trial of that part of the action that related to controversies between GAC and United Nuclear Corporation ("UNC"). The petition fails to furnish any basis to interfere with the proceedings below, especially as they involve or affect this Respondent.

Question Presented

So far as the petition relates to Indiana & Michigan Electric Company ("I&M"), we submit that it raises only one question:

> Whether Petitioner is now entitled to have a judgment obtained against it by this Respondent set aside because of a controversy involving arbitration with another party which in no way involves this Respondent, as Petitioner's conduct below clearly demonstrated.

Counterstatement of the Case

I&M submits that the petition for certiorari should be in all respects denied for the reasons fully set forth in UNC's brief in opposition, and specifically on the ground that the New Mexico Supreme Court correctly determined that GAC consciously waived any claim to arbitration here pertinent. We focus in this opposition brief on a point not discussed in either GAC's petition or in UNC's brief in opposition, namely, the fact that, regardless of the merits of GAC's claims to a right to arbitration against UNC, GAC has no right to any relief which in any way casts doubts upon the rights of I&M, which has no agreement or obligation to arbitrate its claims with anyone and against which no stay was ever sought in any court. Under these circumstances, we submit, any grant of certiorari should at the very least expressly exclude this Respondent from its operation.

I&M is an innocent bystander to the controversy involved in the present petition and it should not be enmeshed in proceedings involving that controversy. GAC has conceded that it has no basis to arbitrate its controversy with I&M. GAC's motion of November 30, 1977 for a stay of proceedings in the district court explicitly excluded "the

issues of GAC's and UNC's obligations to . . . Indiana and Michigan" from the matters sought to be stayed and arbitrated. Although GAC thereafter made repeated motions in the New Mexico Supreme Court for a stay of its trial with UNC, GAC never asked for a stay of the trial of I&M's claims. As recently as March 30, 1978, after the District Court had entered an order granting a partial default judgment against GAC, including all issues of liability, GAC recognized that it had not sought to include I&M in its efforts to stay its trial with UNC when it told the New Mexico Supreme Court in its Reply to I&M's Answer Brief:

> "[T]his appeal at this time raises neither the question of whether GAC is entitled to a stay of the issues between itself and I&M pending arbitration between GAC and UNC, nor the validity of any proceedings subsequent to the orders appealed from, nor the question of whether a judgment obtained by I&M, or any portion of such a judgment, is reversible because GAC was denied the opportunity to seek a stay of proceedings or take other action in the Court below." GAC Reply to I&M Answer Brief at 1, *United Nuclear Corp.* v. *General Atomic Co.*, No. 11,775 (N.M.S.Ct., May 18, 1979).

Only on June 30, 1978, after a final judgment and decree had been entered in favor of I&M,[1] did GAC assert in a supplemental brief that the New Mexico Supreme Court must return all parties, including I&M, to the *status quo ante* April 2, 1976,[2] i.e., vacate *inter alia,* the judgment

1. The District Court entered its "final judgment" in *United Nuclear Corp.* v. *General Atomic Co.* on May 17, 1978. A separate appeal from that judgment is now *sub judice* in the New Mexico Supreme Court.

2. On April 2, 1976 I&M was litigating its dispute with Gulf and GAC in the Southern District of New York. After Gulf and GAC procured the dismissal of that action in December, 1976, I&M was joined as a party defendant in the then pending Santa Fe action. See pp. 5-6, *infra.*

in favor of I&M. The New Mexico Supreme Court properly rejected this belated and unjustified suggestion.

It would seem, therefore, so far as the instant petition concerns I&M, that GAC raises no question worthy of consideration or even remotely relevant to I&M's claims (or bearing on the judgment I&M subsequently obtained), because either:

> (a) GAC never properly sought such relief against I&M in the state court; or
>
> (b) there was an independent and adequate state ground on which the New Mexico Supreme Court denied GAC's application that proceedings vis-a-vis I&M be restored to the *status quo ante* April 1976, namely, that GAC's application—belatedly made in the New Mexico Supreme Court on June 30, 1978, after entry of the final judgment by the District Court—necessarily involved an exercise of discretion by the New Mexico Supreme Court over a purely ancillary matter. Such an afterthought, after all proceedings had moved forward to judgment without any such reservations or comments, was plainly unworthy of serious consideration there and is certainly unworthy of review here.

Nevertheless, without any discussion of I&M's status, or frank disclosure of its remoteness from the issues on which the petition is really based, GAC asks this Court to reverse *all* portions of the order and judgment below and restore the *"status quo ante"* (Pet. at 36-38) which carries with it a disguised suggestion that this Court should also vacate the judgment obtained by I&M. Therefore, we address GAC's petition at somewhat greater length than is warranted by its merits, so that this Court will clearly observe the inappropriateness of any review of the decision below insofar as it relates to I&M, which was in no way involved

in the arbitration controversy upon which petitioner principally relies in its present petition.

Background

We do not extend this brief by any discussion of the initial procedural history of the present action for two reasons: *first,* I&M did not become involved in the New Mexico action until January 21, 1977 when it was made a party defendant on GAC's motion; and *second,* the pertinent facts appear to be accurately set forth in UNC's brief in opposition.

I&M's litigation with GAC began in February 1976, when I&M brought an action to enforce its contract for the supply of fabricated uranium fuel assemblies and uranium concentrates against GAC and its constituent partner, Gulf Oil Corporation ("Gulf"), in the United States District Court for the Southern District of New York. *Indiana & Michigan Electric Co.* v. *Gulf Oil Corp.,* No. 76 Civ. 881 (S.D.N.Y., filed Feb. 24, 1976). Over I&M's objection, Gulf and GAC procured the dismissal of that action in December 1976 on their representations that I&M's claims should and could be tried speedily in the contract action then pending in the New Mexico state court between GAC and UNC where all proper parties, including particularly UNC, would be present and any risk to GAC of inconsistent judgments could be avoided. Transcript of Proceedings, December 21, 1976 at 2-3, *Indiana & Michigan Electric Co.* v. *Gulf Oil Corp., supra.* Upon the dismissal of the action in the Southern District of New York, GAC moved to add I&M as a defendant in the New Mexico state action already pending between UNC and GAC.[3] Although GAC and Gulf

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3. *United Nuclear Corp.* v. *General Atomic Co.,* No. 50827 (Santa Fe County, filed Dec. 31, 1975) was brought by UNC in December 1975 in the New Mexico state court.

were aware that I&M was pressing for a prompt trial, they made no suggestion, in seeking dismissal in New York, that they had any intention other than to try their controversy with I&M in the state court. They evinced no intent to seek to stay that action pending any arbitration with UNC. In fact, a separate arbitration proceeding between UNC and GAC (to say nothing of Gulf) would have been inconsistent with GAC's stated purpose in seeking to have the New York federal action dismissed in favor of a single proceeding in the New Mexico state court. GAC concededly had no basis to arbitrate any controversy it had with I&M. Thus, if it were to arbitrate its controversy with UNC, it would, of necessity, be opting for a bifurcated proceeding—arbitration with UNC and a state court trial against I&M—with the possibility of inconsistent results, the very thing it claimed it wanted to avoid by successfully moving to dismiss the New York federal action and join I&M in the pending New Mexico state court action.

Anticipating speedy progress to trial in New Mexico, I&M did not oppose joinder in the Santa Fe state court action; it joined in the then ongoing discovery and in its answer asserted claims against both Gulf and GAC. In May, 1977, responding to a motion by GAC to enlarge the discovery period, the trial court scheduled trial for October 31, 1978. The trial commenced as scheduled.

On October 31, 1977, this Court announced its decision in *General Atomic Co.* v. *Felter,* 434 U.S. 12 (1977). On November 30, 1977, GAC filed a motion in the state district court to stay the trial of its controversy with UNC, pending arbitration. GAC's stay motion explicitly stated that "At this time no stay is being requested of the proceedings on the issues of GAC's and UNC's obligations to Detroit Edison and Indiana & Michigan Electric Co. . . ." GAC also filed a demand for arbitration with the American Arbitration Association ("AAA") which contained the same

express exclusions.[4] By orders entered on December 16, 1977 and December 27, 1977, respectively, the state court granted UNC's cross-motion for a stay of arbitration on the ground, *inter alia,* that GAC had waived its arbitration rights and denied GAC's motion for a stay of trial proceedings.[5] In the meantime, the trial continued.

On January 5, 1978 GAC moved in the New Mexico Supreme Court for interim relief from the trial court's denial of its stay motion. The New Mexico Supreme Court denied GAC's motion on January 13, 1978. On January 26, 1978, GAC requested that the New Mexico Supreme Court stay the trial pending GAC's petition to this Court (which was never filed) with respect to the New Mexico Supreme Court's January 13, 1978 order. The New Mexico Supreme Court denied this request on February 1, 1978. On February 27, 1978, GAC filed its main brief on the appeal from the trial court's orders denying a stay of the trial as to UNC in the New Mexico Supreme Court. Once again, GAC ignored the status of its dispute with I&M in favor of arguments couched exclusively in terms of its dispute with UNC, but sought as relief stay of "the trial". However, as we have discussed at p. 3 *supra,* after I&M pointed out that GAC had never asked the district court to stay the trial of I&M's disputes with GAC and had no basis for such a request, GAC conceded that no stay of proceedings as to I&M had been or was then being requested. GAC Reply to

4. This was consistent with both GAC's position in the Southern District of New York that it wanted to try its entire controversy with respect to I&M's contract in a single forum, and the fact that I&M has no agreement to arbitrate with anyone.

5. The December 16, 1977 order staying arbitration is the decision of the trial court on remand which this Court directed be vacated by its order in *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978), discussed *infra.* However, this Court declined "to disturb" the trial court's December 27, 1977 order refusing to stay the trial (436 U.S. at 498 n. 2) which is the very order that, as affirmed by the New Mexico Supreme Court, GAC seeks in its instant petition to have this Court review.

I&M Answer Brief at 1, *United Nuclear Corp.* v. *General Atomic Co.*, No. 11,775 (N.M.S. Ct., May 18, 1979) (quoted at p. 3, *supra*).

On May 30, 1978 this Court issued its decision on GAC's mandamus application[6] in *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), in which this Court explicitly refused to "preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate" or to "prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97. At GAC's request, the New Mexico Supreme Court thereupon invited supplemental advice on the effect of that decision on the pending appeals from the trial court's orders and partial judgment. In its June 30, 1978 Supplemental Brief, GAC argued for the first time that, in view of this Court's decision, the only appropriate remedy was to restore the *"status quo ante"* by vacating all orders of the New Mexico courts subsequent to April 1976. GAC Supplemental Brief at 6, *United Nuclear Corp.* v. *General Atomic Co.*, No. 11,775 (N.M.S. Ct., May 18, 1979). GAC asserted in a footnote to that brief:

> "The fact that I&M, which has no agreement to arbitrate with GAC, is now a party to this action does not affect GAC's right to this relief. The decisions construing the Federal Arbitration Act have consistently held that a third party such as I&M, whose claims are intertwined to a substantial degree with arbitrable questions, must await the outcome of the arbitration before securing judicial consideration of the issues that remain in dispute. See, ***e.g., Lawson Fabrics, Inc.* v. *Akzona, Inc.*,** 355 F. Supp. 1146, 1151 (S.D.N.Y. 1973); *Hilti, Inc.* v. *Oldach*, 392 F.2d 368, 369 n.2 (1st Cir. 1968); *C. Itoh & Co., Inc.* v. *Jordan Int'l Co.*, 552 F.2d 1228, 1231 (7th Cir. 1977). Moreover, I&M was impleaded in this action only after GAC was foreclosed, by Judge Felter's unconstitutional order, from joining UNC as a party to I&M's action against GAC in the United States District Court for the Southern District of New York. Hence its very presence in this lawsuit is directly traceable to the unlawful order." (*Ibid.*)

6. On March 3, 1978, GAC had filed an application for leave to file a mandamus petition attacking Judge Felter's orders of December 16, 1977 and December 27, 1977.

The New Mexico Supreme Court rejected this belated argument *sub silentio*, and properly so, since it was clearly erroneous. Not only did the cases cited by GAC fail to support its position,[7] but, regardless of its motives in bring-

7. Each case involved a plaintiff who had invoked a judicial forum to try with one defendant a dispute as to which it had an agreement to arbitrate and who brought into its action a second defendant (as to which no right to arbitrate existed) in an attempt to defeat the first defendant's right to arbitrate. The three courts recognized that the mere presence of such a third party, brought in by the party resisting arbitration, could not defeat the other party's right to arbitration or to a stay pending arbitration. That, of course, is not the case here since it was GAC, the party now allegedly seeking to arbitrate, which brought I&M into this action to try out concededly non-arbitrable claims. Moreover, as I&M pointed out to the New Mexico Supreme Court, courts have consistently recognized that there is no right under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1976), to a stay of trial as to persons who are not parties to an arbitration agreement, but that such a request is a matter to be decided by the court in its discretion, considering familiar principles of judicial economy. *See, e.g., Nederlandse Erts-Tankersmaatschappij, N.V.* v. *Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964); *cf. Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936), where Justice Cardozo wrote:

> "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. . . . Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both."

An exercise of such discretionary power of judicial management raises no federal question and does not call for review by this Court.

ing I&M into the Santa Fe district court initially, it had made every effort, right up to and well past the day of final judgment, to keep I&M in that court and to continue the trial of its dispute with I&M without interruption and without waiting for the result of its arbitration controversy with UNC. For example, GAC's arbitration demand in San Diego, dated November 29, 1977, stated:

> "It is GAC's desire that to the extent possible any disputes between GAC and UNC regarding the meaning of the utility contracts or GAC's obligation under those utility contracts be resolved in appropriate forums where the representative utility, GAC and UNC are all present." Petition for Writ of Mandamus at 43a, *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978).

That GAC changed its mind as to its preferred procedure well after an adverse judgment had been rendered gives it no right, much less a federally protected right, to go back and start over.

Argument

Except for a few casual references in the statement of facts, the present petition completely ignores not only I&M's role in this case, but I&M's rights in the action as to which review is sought, and the unique circumstances which led to I&M's presence in this case. In view of GAC's repeated recognition that it has never sought any stay of its litigation with I&M, together with the fact that it brought I&M to New Mexico for the express purpose of avoiding inconsistent results by trying out its dispute with I&M along with UNC in the New Mexico state court, it would be highly inappropriate to allow this application for certiorari to prejudice I&M's rights, including I&M's judgment.

What GAC appears to be asserting, and the construction it may urge, absent a careful delineation by this Court of

the scope of its determination,[8] is that, *assuming arguendo* the New Mexico court should have stayed the trial of the controversy between GAC and UNC in favor of arbitration, then it follows as a matter of federal law that all proceedings in the state courts subsequent to April 2, 1976—including the trial and judgment in the controversy between GAC and I&M—are a nullity regardless of the facts that:

> (1) I&M has no agreement to arbitrate with anyone;
>
> (2) GAC has never claimed any right to arbitrate any dispute it may have with I&M, contractual or otherwise;
>
> (3) GAC never sought a stay of trial of its dispute with I&M but instead explicitly excepted that dispute from its application for a stay and arbitration vis-a-vis UNC;
>
> (4) GAC obtained dismissal of I&M's New York federal court action by representing that it wanted a "unitary adjudication" of its disputes with I&M and UNC in the New Mexico court and then voluntarily joined I&M as a party before the New Mexico court with the express purpose of trying there its disputes with I&M and UNC;
>
> (5) GAC, by its answer to UNC's complaint, explicitly negated any intent to arbitrate its dispute with UNC regarding those questions which underlie its dispute with I&M; and
>
> (6) GAC never suggested that its attack on the trial court's December 16, 1977 and December 27,

8. GAC's proclivity to adopt expansive and erroneous readings of the language of this Court's decisions is illustrated by the suggestion it now makes in its petition (at 32) that, in spite of this Court's express language recognizing the jurisdictional power of the New Mexico courts to determine whether or not GAC had waived arbitration and whether or not GAC was entitled to a stay of the pending trial (436 U.S. at 496-97), it was nevertheless a violation of the mandate of this Court for the state courts to decide either of these issues as they did. We find nothing of the kind in this Court's mandate.

> 1977 orders raised any question of I&M's right to proceed with its action against GAC until after the trial court's final judgment was entered against GAC on I&M's claim.

Certainly, there is nothing in the language or the spirit of this Court's previous determinations which would suggest that this Court intended to prejudice I&M's right to a speedy trial and judgment, and a present interpretation of those rulings in a way which did so would be completely unfair and unjustified.

Insofar as this petition may be deemed to raise questions regarding the validity of the final judgment in favor of I&M entered by the state trial court and now on appeal to the New Mexico Supreme Court, it raises no genuine federal question at all, much less one warranting review on certiorari. GAC's ambiguous and veiled attack on the judgment of the New Mexico Supreme Court cannot properly be permitted to adversely affect I&M's rights, and if an intent to produce such an effect is lurking in GAC's obscure appeals to restore the *"status quo ante"*, it should be rejected.

We respectfully submit that obscure and unsupported claims unworthy of review should not be allowed to slip through so that they may later be claimed to be involved when care in framing the writ will limit review to subjects deserving of it, if there be any. While we believe that the instant petition should be in all respects denied, if this Court should find any matter raised to be worthy of certiorari, we submit that it is especially important here to apply the well-established principle that certiorari should be carefully restricted to those specific issues which are themselves deserving of consideration on certiorari. *See, e.g., New York City Transit Authority* v. *Beazer,* 438 U.S. 904 (1978); *Mobil Oil Corp.* v. *Higginbotham,* 434 U.S. 816 (1977); *Montana Power Co.* v. *United States EPA,* 430 U.S. 953 (1977); *Alabama Power Co.* v. *Davis,* 429 U.S. 1037

(1977); *Ingraham* v. *Wright,* 425 U.S. 990 (1976); *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission,* 424 U.S. 964 (1976); *Union Electric Co.* v. *EPA,* 423 U.S. 821 (1975); *Securities Investor Protection Corp.* v. *Barbour,* 419 U.S. 894 (1974); *Vella* v. *Ford Motor Co.,* 419 U.S. 894 (1974); *Johnson* v. *Railway Express Agency, Inc.,* 417 U.S. 929 (1974); *Gulf Oil Corp.* v. *Copp Paving Co.,* 415 U.S. 988 (1974). *See generally* Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure:* Jurisdiction § 4004, at 516-17 (1977). This Court has shown similar care in limiting the grant of certorari to those parties who are in fact involved in questions found proper for review, leaving undisturbed the rights of those to whom such questions are not material. *See Shaw* v. *Atlantic Coast Line Railroad,* 353 U.S. 920 (1957).

Conclusion

For the reasons fully set forth in UNC's brief in opposition, with which we concur, GAC's petition for certiorari should be in all respects denied. For the reasons set forth in this brief, insofar as this petition may be construed as in any way involving any right of I&M, including the validity of the final judgment of the New Mexico trial court in favor of I&M against GAC, the appeal of which is now *sub judice* in the New Mexico Supreme Court, it should be expressly denied.

Respectfully submitted,

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September 6, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-190

GENERAL ATOMIC CO.,
Petitioner

v.

UNITED NUCLEAR CORPORATION and
INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondents

On Petition For a Writ of Certiorari
To The Supreme Court of New Mexico

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

IN THE

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On Petition For a Writ of Certiorari
To The Supreme Court of New Mexico

PETITIONER'S REPLY BRIEF

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1. UNC begins its Brief in Opposition with the extraordinary assertion that this case involves "the struggle of GAC to avoid the consequences of its decision to litigate, instead of arbitrate, its principal disputes with UNC . . ." (UNC Br. in Opp., p. 3). The same theme recurs throughout UNC's Brief in Opposition, culminating with UNC's declaration that "GAC elected not to put its right to arbitrate *sub judice* until November 1977—when it finally put the matter in issue by asking for a stay of trial proceedings pending arbi-

tration" (UNC Br. in Opp., p. 30). Time and again UNC tries to have this Court believe that GAC made a deliberate decision to litigate this matter in the New Mexico courts—that even as early as the first months of the litigation GAC "opted for litigation rather than arbitration, and very vigorous litigation at that" (UNC Br. in Opp., p. 8; see also pp. 14-15, 22). The impression UNC seeks to create is that only in late 1977, after it had voluntarily gone far along the litigation road, did GAC suddenly alter its strategy and contest the New Mexico courts' assumption of exclusive jurisdiction.

This effort by UNC to mislead is both curious and misguided. This Court—as much as any judicial tribunal in the land—is surely aware of the vigorous efforts GAC has been making since 1976 to contest the assumption of exclusive jurisdiction by the New Mexico courts. If, as UNC asserts, GAC "opted for litigation," reached a "decision to litigate, instead of arbitrate," and "elected not to put its right to arbitrate *sub judice* until November 1977," why did GAC immediately seek appellate review of Judge Felter's order of April 2, 1976, which channeled this case in the direction of litigation in the New Mexico courts, and why did GAC knock repeatedly on this Court's doors beseeching it to overturn obstacles erected by the New Mexico courts to arbitration and to other federal tribunals? Even if there were no pleadings in this case other than the petitions heretofore filed by GAC in this Court, it would be demonstrably false to conclude, as UNC alleges, that GAC deliberately and voluntarily "opted for litigation" in the New Mexico courts.

In making and repeating its assertion that GAC voluntarily chose to litigate rather than arbitrate, UNC —like the New Mexico Supreme Court—also overlooks

other irrefutable historical evidence. During the hearing of March 24, 1976, on UNC's motion for a preliminary injunction, UNC requested Judge Felter to enjoin the initiation of arbitration, *declaring that GAC had notified UNC of its intention to join UNC in one pending arbitration and expressing concern that UNC might be made a party in other arbitrations in "unknown places"* (p. 3a, *infra*).[1] Judge Felter then expanded the temporary restraining order he had previously issued so that it would cover "the institution or prosecution of . . . arbitration proceedings." If, as UNC now asserts, GAC had already made "Decisions to Litigate" (UNC Br. in Opp., p. 8), why did UNC have to secure an injunction against "the institution or prosecution of . . . arbitration proceedings"? Indeed, if GAC had "opted for litigation rather than arbitration," what was the purpose of GAC's notification to UNC that it intended to join UNC in a pending arbitration?

The fact is that GAC had made no "decision to litigate" before April 2, 1976. When the unlawful injunction was issued, GAC was exercising the right it had under federal arbitration law to preserve its option as to whether to litigate or to demand arbitration until the time its answer had to be filed. To this end, GAC explicitly reserved the right to demand arbitration in every substantive pleading filed before April 2, 1976. When Judge Felter unconstitutionally and improperly closed off other forums on April 2, 1976, with the issuance of his illegal injunction, GAC, having no real alternative, was remitted in his court to the lesser of the evils which he had left open—*i.e.*, litigation in which

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[1] The relevant portions of the Transcript of March 24, 1976, are reproduced as Appendix A to this Reply Brief, pp. 1a-4a, *infra*.

utilities could be joined as parties[2]—while it simultaneously sought to have Judge Felter's unlawful restraint vacated.

2. The unsoundness of UNC's assertion that GAC "opted for litigation" can be further demonstrated by examining the action which UNC says GAC should have taken to preserve its right to arbitrate. Significantly, UNC's Brief in Opposition does not defend the New Mexico Supreme Court's novel interpretation of Judge Felter's order of April 2, 1976. UNC does *not* claim in its Brief in Opposition that, under the terms of the injunction, GAC could have "serv[ed] a demand [for arbitration] on UNC in New Mexico, without regard for the location at which the arbitration would take place," as the New Mexico Supreme Court erroneously declared (Pet. App., p. 22a).[3] Rather, UNC now

[2] Seeking to eliminate the "substantial risk of inconsistent adjudications" which this Court recognized in its opinion of October 31, 1977 (434 U.S. at 18, n.11), GAC instituted a federal interpleader action in January 1976 attempting to join UNC and various utilities in one federal proceeding. GAC of course "made no demand for arbitration in the interpleader action" (UNC Br. in Opp., p. 9) because it did not have a contract right to arbitrate with all the utilities. UNC has failed to note, however, that GAC's interpleader complaint explicitly reserved its right to arbitrate with UNC "under . . . the 1973 Uranium Supply Agreement" so that if—as happened—interpleader jurisdiction was held lacking, the arbitration remedy could be invoked.

[3] There is one oblique reference to this peculiar interpretation in UNC's Brief in Opposition. UNC argues that the question whether the New Mexico courts "misinterpreted their own order is a unique issue that has no general importance warranting review by this Court" (UNC Br. in Opp., p. 25). Judge Felter did not "misinterpret" his own order. His own Finding of Fact No. 13 (Pet. App., pp. 46a-47a) demonstrates that he viewed the injunction as a prohibition against "pending or contemplated arbitration proceedings instituted by the utilities" and that he permitted only

suggests that after Judge Felter entered his order of April 2, 1976, GAC should have preserved its right to arbitrate by asking Judge Felter, under Section 3 of the Federal Arbitration Act, for a stay of further court proceedings pending arbitration (UNC Br. in Opp., pp. 13, 25, 27, 30-31). This is a hopelessly unreal suggestion.

In making this suggestion, UNC overlooks the fact that after considering an adversary presentation in briefs and oral argument, Judge Felter had, prior to April 2, 1976, decided to enjoin proceedings in all other forums and had, *on UNC's specific demand,* added a ban against the "institution and prosecution of . . . arbitration" to the terms of his prohibitory injunction. In these circumstances, would it have been other than brazen and futile for GAC to appear in Judge Felter's court on the following day with a request that the judge who had directly and unequivocally enjoined arbitration now stay his proceedings pending arbitration? In the same vein, having opposed the issuance of the preliminary injunction and being actively engaged thereafter in appellate proceedings to overturn that order by means of a Writ of Prohibition directed to the trial judge, could GAC have been expected repeatedly to make futile demands for arbitration and thereby aggravate the judge, who then had, through his own

"arbitration with UNC *in this forum.*" (Emphasis added.) If the order, as plainly understood by Judge Felter and by the parties, prohibited the very steps which are now said by the New Mexico Supreme Court to be the only means by which federal rights could have been preserved, the "misinterpretation" by the New Mexico Supreme Court rises to the level of a violation of the Due Process Clause and the Federal Arbitration Act.

order, assumed exclusive jurisdiction over this most significant case?[4] This Court has, on many occasions, in varying circumstances, ruled that a claim is not lost because of a party's failure to file utterly futile applications or requests. See, *e.g.*, *Montana National Bank* v. *Yellowstone County*, 276 U.S. 499, 505 (1928); *City Bank Farmers' Trust Co.* v. *Schnader*, 291 U.S. 24, 34 (1934); *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965); *Brown* v. *Allen*, 344 U.S. 443, 449 n.3 (1953).

Moreover, as we noted in our Petition, a request for a stay under Section 3 of the Federal Arbitration Act is not a precondition to arbitration under the Federal Arbitration Act (Pet., pp. 23-24 & n.20, 32). GAC's right to proceed to federal arbitration could not, therefore, be deemed to have been waived merely because it had not requested a stay of the trial pursuant to Section 3.[5]

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[4] Contrary to UNC's suggestion (UNC Br. in Opp., p. 28), the April 2, 1976 order was not rendered temporarily ineffective by the New Mexico Supreme Court's issuance of an "Alternative Writ of Prohibition." An "Alternative Writ of Prohibition" is simply the procedure by which the New Mexico Supreme Court indicates that it is considering the merits of a challenge to a trial court's order. If the challenge is sustained, the order is rendered void. If —as was true here—the challenge is rejected, the trial court's order is effective from the date of its entry and a party violating it, even while the "Alternative Writ" is outstanding, may be punished for contempt.

[5] Nor did the language of the eighth defense in GAC's answer, on which UNC relies (UNC Br. in Opp., pp. 13-14, 28-29), constitute an "express disclaimer" of federal arbitration. The answer was filed under the limitations imposed by Judge Felter's illegal order of April 2, 1976, which required GAC to navigate between the Scylla of a contempt sanction if it demanded arbitration in other forums and the Charybdis of inconsistent adjudications between the utility arbitrations which had previously been instituted and a possible judgment in the Santa Fe proceeding. As UNC's Statement indicates (UNC Br. in Opp., p. 12), the only arbitration permitted under Judge Felter's order was arbitration "in this forum" and "[s]ubject to the supervision of this court." Since it was then permitted to demand arbitration only in Judge Felter's "forum" and "subject to his supervision" but did not wish to arbitrate issues relating to the 1973 Supply Agreement under those conditions, GAC excluded from its demand all issues concerning the validity and enforceability of the 1973 Supply Agreement. In order to avoid inconsistent judgments, it was prepared to arbitrate, even under Judge Felter's supervision (if unwillingly forced into that forum), the utility claims which could be decided in a three-party arbitration. At the same time, however, GAC was pursuing in appellate courts—and ultimately in this Court—its right to have its disputes with UNC resolved in other forums, including federal courts and arbitration proceedings.

3. Seeking to avoid review by this Court of the plainly erroneous ruling of the New Mexico Supreme Court—and thereby to prevent reversal of a judgment concededly worth at least one billion dollars—UNC asserts that the central issues "turn upon the facts and circumstances of this particular case" (UNC Br. in Opp., p. 24).

This is, of course, true of many cases which require the application of principles of federal law to a particular record. Thus, for example, other decisions rendered by this Court concerning the authority of arbitrators, such as *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), required an evaluation of "the facts and circumstances of . . . [a] particular case" and the application to such facts of the governing rule of law. In this case, as we demonstrate in our Petition (pp. 33-36), there are substantial general questions of federal arbitration law which are raised by the decision of the New Mexico Supreme Court. Indeed, UNC's

head-on challenge to the uniform federal rule which grants a party in litigation the option to elect arbitration at any time before the filing of an answer (UNC Br. in Opp., pp. 29-30) itself presents an issue worthy of review in this Court. UNC's suggestion that a plaintiff in litigation—who has deliberately chosen to bring his claim to court—may repudiate his choice and demand arbitration before the defendant files his answer, while a defendant, who is brought into court involuntarily, has less time to invoke an arbitration clause, is contrary to all reason and conflicts with decisions of federal appellate and trial courts. See *Hilti, Inc.* v. *Oldach,* 392 F.2d 368, 371 (1st Cir. 1968); *Erving* v. *Virginia Squires Basketball Club,* 468 F.2d 1064, 1068 (2d Cir. 1972); *Lumbermens Mutual Casualty Co.* v. *Borden Co.,* 268 F.Supp. 303, 312 (S.D.N.Y. 1967); *G.B. Michael* v. *S.S. Thanasis,* 311 F.Supp. 170, 181 (S.D.N.Y. 1970); *Harman Electrical Constr. Co.* v. *Consolidated Engineering Co.,* 347 F.Supp. 392, 399 (D.Del. 1972). And the mere fact that the court below intoned some correct legal propositions but nonetheless arrived at the wrong result does not insulate its erroneous judgment from review here.

4. UNC disputes our claim that the ruling of the New Mexico Supreme Court permits it to secure indirectly the benefits of the restraint against arbitration which this Court has twice vacated. It asserts that the decision below still leaves GAC free to "mak[e] ... any assertions it pleases, however erroneous, in any 'federal forum' it chooses regarding its 'views' in regard to 'its entitlement to arbitration' " (UNC Br. in Opp., pp. 22-23). But it also claims that, under the rules of *res judicata* and Full Faith and Credit, the "federal forum" must instantly reject GAC's requests for arbitration because the New Mexico Supreme Court has determined in this case that the "entitlement to arbitration" was waived. In other words, UNC contends that this Court's two rulings mean that GAC only has the freedom to present "its entitlement to arbitration" to a "federal forum," so that the "forum" will reject it. This argument, if sustained, makes a mockery of this Court's two earlier rulings.

The most recent of the two federal proceedings initiated by UNC, which it now characterizes as "entirely irrelevant here" (UNC Br. in Opp., p. 21, n.18), illustrates the point graphically. Interrupting the sessions of the arbitration panel which was then hearing argument on the "preliminary issues" raised by UNC, UNC walked out of the arbitration proceding on March 29, 1979, and filed a lawsuit in federal court to enjoin the arbitration against the arbitrators, the American Arbitration Association and GAC. The principal ground asserted was that the doctrine of Full Faith and Credit was violated if the arbitrators failed to apply Judge Felter's ruling that GAC had waived its right to arbitrate. After GAC successfully argued for dismissal on the ground that a claim under the Full Faith and Credit doctrine does not give rise to federal-question jurisdiction (see *Minnesota* v. *Northern Securities Co.,* 194 U.S. 48 (1904)), UNC was granted leave on September 4, 1979, to amend its complaint to allege diversity-of-citizenship jurisdiction. *United Nuclear Corp.* v. *General Atomic Co., et al.,* Civ. No. 79-0329-E (S.D. Cal.). No arbitration session on the merits of the dispute has been conducted and no decision on the preliminary questions has been issued by the arbitration panel since the lawsuit was begun. And UNC is arguing in the federal court that the erroneous waiver rul-

ing we are seeking to review here is a final and binding determination which, of and by itself, precludes arbitration. If this claim is upheld, the decisions of this Court would be reduced to hollow rulings.

When UNC made the same argument to the arbitration panel, insisting that this Court's rulings meant only that GAC could present its arbitration request but that the request would immediately and automatically have to be rejected because the New Mexico trial court had conclusively decided that arbitration was waived, the chairman of the arbitration panel, the Hon. Walter V. Schaefer, former Chief Justice of the Supreme Court of Illinois, responded as follows (Transcript of December 13, 1978, p. 92):

> Well, let me suggest this: Doesn't that view indicate that the Supreme Court of the United States is playing games? You have a right to file but the tribunal has no right to decide.[6]

[6] UNC of course quotes and relies on the two sentences in this Court's opinion of May 30, 1978, which note that the earlier decision of October 31, 1977 "did not preclude . . . findings concerning whether GAC had waived any right to arbitrate" and did not "prevent the Santa Fe court . . . from declining to stay its own trial proceedings" (UNC Br. in Opp., pp. 19, 23). We have previously expressed our belief that these observations were interpretations, in the context of our request for mandamus, of the meaning of the "prior opinion" or "prior decision" of this Court (Pet., pp. 32-33). In any event, UNC has overlooked other language in this Court's decision of May 30, 1978, which supports the opposite result—*i.e.*, that the New Mexico courts may not hinder arbitration by any judicial action, including a finding of waiver (436 U.S. at 497; emphasis added):

> [W]e have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration *or for any other reason whatsoever.*

The decision of the New Mexico trial and appellate courts that

5. On the one hand UNC endeavors to minimize the importance of the fifth question presented in our Petition and on the other hand it asserts that the New Mexico Supreme Court's ruling on that issue was "an independent ground for the denial of a stay pending arbitration . . ." (UNC Br. in Opp., pp. 37-38). In fact, the primary issue presented—*i.e.*, whether state antitrust issues are arbitrable under the Federal Arbitration Act—is much more significant than might be inferred from the paucity of judicial decisions discussing the question to date. If, as the court below has held, the mere assertion of a state antitrust claim or defense removes a dispute from the reach of the Federal Arbitration Act, parties to arbitration clauses will henceforth be able easily to prevent arbitration of ordinary contract disputes by bringing one or more of their defenses within the broad language and uncertain boundaries of local laws regulating competition. The fact that this has seldom been tried in the past is proof only that parties to arbitration clauses have not, to this time, believed that they could so facilely avoid the duty to arbitrate. State antitrust laws have, until recent years, been infrequently invoked, but if the New Mexico Supreme Court's decision is permitted to stand, many arbitrations can be expected to fall victim to UNC's innovative tactic.

Moreover, the sweeping "intertwinement" ruling issued by the New Mexico Supreme Court—which affects cases involving federal antitrust and securities act claims—is plainly erroneous. UNC concedes that the contractual question whether or not it was legally

GAC's right to arbitration was waived, when invoked as a binding judicial determination precluding arbitration, is plainly "interfer[ence] with the efforts by GAC to obtain arbitration." And it is being used by UNC to prevent arbitration altogether.

bound to supply uranium before 1971 (prior to any of its dealings with Gulf) was a "hotly disputed" issue (UNC Br. in Opp., p. 5, n.5). Also in dispute is whether Gulf withheld capital and uranium from GUNF, the corporation jointly owned by UNC and Gulf, and whether UNC was therefore "[r]endered vulnerable" and "coerced into selling its interest in GUNF . . ." (UNC Br. in Opp., p. 6). Other issues of contract interpretation such as limitation of liability and *force majeure* have been raised by UNC. These are all typically arbitrable disputes which could be resolved without reference to any antitrust question. If GAC prevailed on some of these arbitrable questions, no state antitrust issue would remain in the case. If, for example, UNC committed itself contractually by 1971 to sell uranium at prescribed prices, UNC's otherwise erroneous allegation that "in 1971 Gulf became a charter member of a uranium cartel" (UNC Br. in Opp., p. 6) and thereafter sought to tie up previously uncommitted uranium becomes totally irrelevant. Whatever Gulf may have done with respect to the "cartel" would have no causal relation to injury suffered by UNC because of its pre-existing commitment to deliver the uranium at the contract prices. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Or if an arbitration panel found that Gulf did not withhold capital and uranium from GUNF for any reason, and UNC's sale of its interest in GUNF was voluntary, there would be no materiality to the allegation that Gulf committed these acts to further the goals of the "cartel." Hence in this case, as in *Sibley* v. *Tandy Corp.*, 543 F.2d 540, 543 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977), the assertedly nonarbitrable disputes are "dependent" upon the resolution of classically arbitrable questions.

6. The Brief in Opposition filed by I & M does not defend on the merits the opinion of the New Mexico Supreme Court. It argues only that since there is no arbitration clause in any contract between GAC and I & M, there is no reason to leave I & M as a party to this case if this Court grants the writ of certiorari.

In making this argument, I & M overlooks the realities of the situation. If Judge Felter had granted a stay of his trial after GAC was finally permitted to file arbitration demands against UNC, the proceeding before Judge Felter would not have gone ahead with only GAC and I & M as parties.[7] That dispute would, rather, have been stayed in order to await the resolution of the GAC-UNC arbitration. The losing party in the GAC-UNC arbitration would then have to deal with I & M because it would be the responsibility of that party to supply the uranium needed for the I & M agreement.

In some circumstances, the decision whether to stay a trial involving a third-party defendant who is

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[7] This was clearly indicated in GAC's Reply Brief filed in the New Mexico Supreme Court, which I & M has quoted only in part and in distorted context, in its Brief in Opposition (p. 3). The full second paragraph of the two-paragraph Argument section of GAC's Reply Brief reads as follows (the underlined words having been omitted in I & M's Brief in Opposition):

> *Had GAC obtained arbitration with UNC, it would have moved to stay part or all of the proceedings pending below between itself and I & M. The actions of the Court below prevented GAC from pursuing this course. However,* this appeal at this time raises neither the question of whether GAC is entitled to a stay of the issues between itself and I & M pending arbitration between GAC and UNC, nor the validity of any proceedings subsequent to the orders appealed from, nor the question of whether a judgment, is reversible because GAC was denied the opportunity to seek a stay of proceedings or to take other action in the Court below.

not under a duty to arbitrate pending arbitration between a plaintiff and defendant who are parties to an arbitration clause may be a routine matter of judicial discretion (see I & M Br. in Opp., p. 9, n.7). But when the party demanding arbitration has been unconstitutionally kept from pursuing that remedy for more than two years and a trial that should never have taken place has resulted, culminating in a billion-dollar default judgment that should never have been issued,[8] it is hardly a matter of everyday "judicial management" to say that the third-party defendant should reap the benefits of an erroneous refusal to stay the trial.

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[8] While insisting at the outset that the default judgment entered by Judge Felter is not in issue here (UNC Br. in Opp., p. 3), UNC sets out the text of the amended default judgment in 22 of the 25 pages of its Appendix. The virtually identical text of the original default judgment appeared at pages 2a-25a of GAC's petition for a writ of certiorari in No. 77-1269. The Santa Fe court's "recitals" and findings are totally erroneous and have been challenged in great detail in GAC's appeal now pending in the New Mexico Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the New Mexico Supreme Court reversed.

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Of Counsel

September 18, 1979

APPENDIX

APPENDIX A

Excerpts From Transcript of March 24, 1976

IN THE DISTRICT COURT OF THE STATE OF NEW MEXICO

SF-50827

UNITED NUCLEAR CORPORATION, *Plaintiff*,

vs.

GENERAL ATOMIC COMPANY, et al, *Defendants*.

TRANSCRIPT OF PROCEEDINGS

From the District Court
of
Santa Fe County, State of New Mexico

Edwin L. Felter
District Judge

March 24, 1976

• • • • • • • • • • •

[p. 2]

THE COURT: United Nuclear Corporation, Plaintiff, versus General Atomic Company, Defendant, Santa Fe Cause No. 50827. We have here before us an application for a preliminary injunction. The Court has under advisement a motion to dismiss for want of personal jurisdiction and a motion to dismiss for failure to join indispensable parties.

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[p. 6]

[MR. BIGBEE, counsel for UNC:] ... I could care less what the commitments are as between GAC and Duke. I know

our contract says it has to be on Oconee reactor and the record shows, their letter, that a previous delivery went to another reactor, McGuire, I think, a reactor which we had no obligations to. This involves the circumstances where these utilities had sold some and were trying to maneuver around their obligation. He mentions this for the singleness of obligation because they do tell us they are going to get us involved in an arbitration proceeding in this contract and our provisions—if this injunction should include arbitration they admit they make a demand on us and the contract that says 210,000 for requirement for Oconee 1 which they increased to 385,000 for their general reactor program. It shows the absurdity of joining all these things together.

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[p. 11]

[MR. BIGBEE:] . . . Now, they tell us that they are specifically—that specifically GAC plans to seek joinder of UNC in the lawsuit filed on February 24, 1976 in the United States District Court for the Southern District of New York. GAC also expects to seek the participation of UNC in the arbitration proceeding demanded by Duke on February 13, 1976, under a contract executed after we were no longer even a party to the requirements.

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[p. 14]

[MR. BIGBEE:] . . . There is these arbitration proceedings that they say—ot [sic] only Duke, but they moved to get us right in the middle of it. They didn't let us talk to them. We couldn't even discuss with the utilities whether they were willing to pay us a higher price because they said stay away from them and that matter is attached to these other matters. Now, they say all of a sudden that we are real indispensable to anything. They said that was their business, we would stay away from the utilities in relation to any contractual matters. Now they say we are indispensable. That was their business, so they changed these negotiations and what they wanted on uranium. That works two ways. They can't take this position all the time and change the agreement and then come in and say that they are indispensable. That is not the case.

• • • • • • • • • • •

[p. 17]

[MR. BIGBEE:] . . . They also say they intend to make us a party to an arbitration proceeding so I ask that the order be expanded under any proceedings, including an arbitration proceedings with Duke, just because they have unilaterally—they have admitted, Your Honor, the question whether those parties are indispensable here.

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[p. 18]

[MR. BIGBEE:] . . . The Donovan case isn't here, but they have admitted and stated that they are going to do something to get us joined in that, not only there, but I don't know how many unknown places, in arbitration and other proceedings, and based upon their admission that this is the best place to litigate, and assuming Your Honor rules that these are not indispensable parties, it can only be for vexatious purposes.

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[pp. 21-22]

[MR. BIGBEE:] . . . We are now on another case that is not necessarily limited to the Federal court—arbitration proceedings, mainly being called to be a party in an arbitration that we have never seen the executed contract until the litigation runs. That is our Duke situation; we never saw it. The Detroit—they say they are getting problems, they are going to join us again on a 1975 agreement, so we submit that this is a classical circumstance, that we must be

given the protection from being rushed from New York City to North Carolina, to Detroit, Michigan, to Chicago, Santa Fe and Albuquerque, and if you have got a classical situation where you have a pleading that says that is precisely what they are going to do, and they don't say even subject to Your Honor's ruling on whether these are the same obligations.

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[pp. 37-38]

MR. HARRIS [counsel for GAC]: I did not add the subject of the North Carolina arbitration dispute that we have with Duke and the probability that we may seek to make them a party back there, and he talked about that. My position is it is true that we, unless retrained [sic; restrained] by Your Honor, may well take some action in North Carolina to make them a party to the arbitration where we are already a party and we've got the same thing in Detroit. I do not—in either of those instances, on the Donovan case. The Donovan case does not have anything to do with either one of those cases because there is no pending federal court case. And we rely upon the general rule under Point I of our brief that we should not be restrained from taking action to protect ourselves, if there is a reasonable ground for our doing so, to protect a legitimate interest of ours, because it is not vexatious and it is not oppressive, nor is it harrassment. We relied on that point alone to oppose the preliminary injunction that they are seeking.

MR. BIGBEE: Mr. Harris has admitted again by saying that he is going to bring us into this arbitration if it is not enjoined, that he is going to try to segment our lawsuit and our controversy concerning the validity of the contract between ourselves and them only into four separate proceedings in four different states, involving arbitration or court action, plus the one in Albuquerque and that makes five. When it has gone to that extent, I submit it is vexatious.

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